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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,

Petitioner,

vs.

ELVIRA OLIVIERI COMMINS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUGGESTIONS OF RESPONDENTS ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, ETC., IN OPPOSITION TO PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF SUGGESTIONS.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Introductory.

Defendants Elvira Oliveri Commins, Manuel Francisco Lluberas and his wife Hazell Kelly Lluberas, Antonia Lluberas Passarell, Rosa Elena Lluberas Passarell, Graciela Lluberas Passarell and her husband Antonio

Valenti Maestre, Celia Lluberas Passarell and her husband Emilio Blasini Totti, and Raquel Lluberas Passarell, hereby make opposition to the petition of Mario Mercado e Hijos, a partnership, for a writ of certiorari to review the judgment that was rendered by the Circuit Court of Appeals for the First Circuit on August 23, 1943 (Rec. p. 518), dismissing the appeal taken by said partnership from the judgment that the Supreme Court of Puerto Rico rendered on July 31, 1942 (Rec. p. 488), affirming the judgment of the District Court of Ponce of April 9, 1941 (Rec. p. 45):

(1) Because the said judgment is correct, as it is sustained by the oral and documentary evidence in the case as weighed by the District Court of Ponce;

(2) Because the law was correctly applied; and,

(3) Because the appeal so taken is frivolous and, furthermore, academic.

Opinions of the Courts Below.

The opinion of the Insular District Court of Ponce (Statement of Facts, Opinion and Judgment, Rec. pp. 31-44). The opinion of the Supreme Court of Puerto Rico, affirming the District Court is reported in 60 D. P. R. 877-890 (Spanish edition). It has not yet appeared in the English edition of the Puerto Rico Reports. The judgment of the Circuit Court of Appeals, affirming that of the Insular Supreme Court (Rec. 518).

Jurisdiction.

Jurisdiction exists in this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Question Presented.

By its petition for a writ of certiorari before this Court, partnership Mario Mercado e Hijos aims to annul Rule 39

of the First Circuit Court of Appeals as it was revised and adopted by the latter court, effective September 20, 1940. This rule has its source in the decision rendered by this Honorable Court in the case of *Sancho Bonet, Treas.* v. *The Texas Co.*, 308 U. S. 463, 470-472 (Petition, p. 2).

The manner in which the validity and extent of that Rule is attacked shows that the purpose of petitioner is none other than a revision by this Court, on its merits, of the judgment that the District Court of Ponce rendered in the instant case dismissing petitioner's complaint, judgment that was affirmed by the Supreme Court of Puerto Rico, (*Mario Mercado e Hijos* v. *Olivieri*, decided on July 31, 1942 and reported in 60 D. P. R. 877-890 (Spanish edition)). It thus appears from the arguments adduced in petitioner's brief and from the prayer therein (Petition, page 20).

We anticipate that the judgment aforesaid was rendered by the District Court of Ponce after it had weighed all the evidence adduced by the parties in the suit and after it had decided the conflicting testimonies of the witnesses of both parties therein in favor of the defendants (Rec. pp. 31-44).

The general doctrine is that unless passion, partiality or prejudice is shown, none of which have been alleged nor shown by your petitioner, a judgment will not be reversed by the appellate court. The errors assigned by the petitioner are imaginary and do not exist.

Statement.

On March 23, 1932, the petitioning partnership Mario Mercado e Hijos, and the codefendants Elvira Olivieri Commins, the opponents herein, executed deed No. 13, before Notary Public Fernando Zapater Martínez. By that deed Elvira Olivieri Commins acknowledged to be indebted to the said partnership in the sum of $41,256.89, and, in payment thereof, the said Elvira Olivieri Commins issued, subscribed and delivered to the partnership Mario Mercado e

Hijos four promissory notes, three of them for the sum of $10,000.00 each, and the fourth for the sum of $11,256.89, the payment of which promissory notes she secured with a mortgage on her share in the properties known as "Indios" and "Juanita", located in the municipality of Guayanilla, Puerto Rico, jointly owned by her and her sister Santia Olivieri Commins (Rec. 225). Both properties aforesaid were at that time leased to the partnership Mario Mercado e Hijos (Rec. 227).

The seventh clause of the said mortgage contract states as follows:

> "Option to Purchase and Sell and to Lease.—Notwithstanding the foregoing clause, the debtor, *as part of the consideration of this contract*, agrees with the partnership Mario Mercado e Hijos, *so long as the mortgage credit herein constituted is not paid*, to grant it priority to purchase and sell or lease her undivided joint interests in the estates 'Indios' and 'Juanita' upon the same price and terms. To this effect, the debtor shall advise, unless such mortgage credit is paid, by registered letter to Mario Mercado e Hijos, of any offer of sale or lease made to her and said partnership shall be granted thirty days for accepting or refusing such offer and during said period the debtor cannot sell or lease to anybody else. Should there be a sale or lease in violation of this agreement, Mario Mercado e Hijos shall be entitled to repurchase from the purchaser or lessee, which right it can exercise for thirty days from the record of such sale or lease for subrogating itself to the place, degree or priority of the purchaser or lessee" (Rec. p. 327).

The four promissory notes secured with the mortgage referred to were later on endorsed and conveyed or assigned by the partnership Mario Mercado e Hijos to the Heirs of José Tous Soto, four of which heirs were then minors and one was an incapacitated person, as it appears from the

records of the proceedings for judicial authorization filed in the District Court for the Judicial District of Ponce, wherein the said minors and incapacitated person were domiciled (Exhibits 1 for defendants, Rec. pp. 384-396), pursuant to the provisions of Sections 80, 81 and 82 of the Special Legal Proceedings Act (Sections 614 and 616 of the Code of Civil Procedure (1933 ed.), *Longpré* v. *Díaz*, 213 U. S. 512, cited with approval in *Zayas* v. *Torres*, 51 P. R. R. 772, 776).

In the conveyance and assignment aforesaid the following wording is used:

> "Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby *conveys, renounces and assigns* in favor of Mrs. Belén González, widow of Tous, in the representation in which she appears in this execution and *in her own right*, and to Doña Ana Rosa Tous de Carrión, Doña Luz Belén Tous de Usera, Doña Alicia and Doña Celia Tous y González, the mortgage credit constituted by the deed above transcribed, *the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act* and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the notary, certify" (Rec. 406).

Neither in the petition for judicial authorization before the District Court of Ponce, nor in the judgment rendered in the said judicial authorization proceedings (Rec. pp. 393-396), nor in the deed whereby partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the said promissory notes and the mortgage securing them (Rec. pp. 397-412), is there any statement whatever to the effect that the partnership Mario Mercado e Hijos had reserved any rights over the "Option to Purchase and Sell

and to Lease" clause. Neither Elvira Olivieri Commins nor any of the other codefendants were a party to, or participated in, the said judicial proceedings or in said deed.[1]

Not even in the registry of deeds, where the assignment of the mortgage credit was recorded, appears the alleged inexistent reservation of rights to the "Option to Purchase and Sell and to Lease" clause as claimed by the Partnership Mario Mercado e Hijos (Exhibit "9" for defendants. Rec. pp. 470-471). Nowhere in the notice of the assignment, served by Notary Public Fernando Zapater on Elvira Olivieri Commins pursuant to the provisions of Section 152 of the Mortgage Law and Section 185 of the Regulations for the Execution of the said Mortgage Law, was the referred to Elvira Olivieri Commins informed that the partnership Mario Mercado e Hijos had reserved any right over the "Option to purchase and sell and to lease" clause above mentioned.[2]

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[1] "The contracting parties cannot by stipulation limit the scope of the terms of the contract without the consent of a third person, who participated in the agreement by approving it and without whose intervention and approval the contract would not have been made.

"In construing a stipulation, a court cannot add to the scope thereof by extending it beyond its own terms and the intention of the parties." *Caribbean Eng. Co.* v. *Municipality*, 60 P. R. R. 26.

[2] "Art. 152. A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

"The debtor shall not be bound by said contract to any further extent than he was by his own.

"The assignee shall be subrogated to all the rights of the assignor." Article 152 of the Mortgage Law.

"Art. 185. Before recording the assignment of a mortgage credit, the debtor shall be advised, unless he shall have waived the right to notice in a public instrument, or if such a case as that mentioned in article 153 of the law should be involved, by means of a notice to be drawn and signed by the notary who may have authenticated the deed, stating therein merely the date of the assignment, the fact of the same being total or partial, and in the latter case the amount assigned, and the name, surname, residence, and occupation of the asignee. The notary shall serve or cause this notice to be served upon the debtor.

On March 4, 1937, Belén González widow of Tous Soto, as mother with *patria potestas* over her minor children and as guardian of the incapacitated one named José Tous González, appeared before the District Court of Ponce by her attorney Fernando Zapater Martínez, who was then likewise attorney for the partnership Mario Mercado e Hijos (Rec. pp. 183-184), requesting judicial authorization from the said Court in order to cancel in full the mortgage that had been constituted to secure the said four promissory notes that the partnership Mario Mercado e Hijos had conveyed and assigned to and belonged to the Heirs of José Tous Soto (Exhibit "4" for defendants, Rec. pp. 425-451). Nowhere in the record of the above proceedings, nor in the judgment rendered by the district court therein (Rec. pp. 448-451), does it appear that the Heirs of José Tous Soto or any of them, or the District Court of Ponce, had admitted that partnership Mario Mercado e Hijos *had reserved any right whatsoever over the "Option to Purchase and Sell and to Lease"* clause.

On March 8, 1937, before Notary Public Fernando Zapater Martínez, the Heirs of José Tous Soto executed deed No. 47 whereby the above-mentioned heirs received then and there the amount of $41,256.89 representing the total amount of the four promissory notes and cancelled in full the mortgage securing said notes. The mortgaged properties known as "Indios" and "Juanita" belonging to the defendant Elvira Olivieri Commins, were thus freed from the mortgage encumbrance (Exhibit "I" for plaintiff; Exhibit "5" for defendant, Rec. pp. 312-321). Partnership Mario Mercado e Hijos, which had voluntarily and for

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"If the debtor should not be found at his residence, service shall be made in the form prescribed for summonses in the first paragraph of article 268 of the Law of Civil Procedure for Cuba and Porto Rico, and 252 of that for the Philippines." Article 185 of the Regulations for Execution of the Mortgage Law.

its sole benefit parted with the possession of the said promissory notes and of the mortgage securing them since March 9, 1933 (Exhibits 2 and 3 for defendants, Rec. pp. 397-424), did not intervene therein.

On March 9, 1937, as per deed No. 40 of that date before Notary Public Luis López de Victoria (Exhibit "D" for Plaintiff, Rec. pp. 260-268), Elvira Olivieri Commins sold the "Indios" property to the codefendants Lluberas Passarell. At that time, the mortgage securing the four promissory notes that had originally belonged to Mario Mercado e Hijos and since 1933 had belonged to the Heirs of José Tous Soto did not exist, for due to the payment made to the said heirs of the full amount of the four promissory notes, they had totally cancelled the mortgage securing them on March 8, 1937 (Rec. 312-321).

Elvira Olivieri Commins was under no obligation to notify neither the petitioner Mario Mercado e Hijos nor the Heirs of José Tous Soto of her decision to sell or to lease her properties known as "Indios" and "Juanita", respectively. The "Option to Purchase and Sell and to Lease" clause, together with the mortgage of which the said clause formed a part of, had already disappeared and had no legal existence and, therefore, the petitioner Mario Mercado e Hijos could not complain of any fraud nor bring the instant suit on the ground of an alleged fraud based on imaginary or supposed rights which did not exist.

The opportunity which the partnership Mario Mercado e Hijos had to purchase or to lease the "Indios" and "Juanita" properties was lost through its own voluntary acts. The fact that Mr. Barletta, a relative and an agent of Elvira Olivieri Commins, had attempted to sell or to lease the said properties to Mario Mercado e Hijos at about the same time that Elvira Olivieri Commins was personally selling her property "Indios" to the Lluberas-Passarell brothers and leasing the "Juanita" property to Emilio

Blasini Totti, gave no right whatsoever to the partnership Mario Mercado e Hijos.. Moreover, from the said licit acts neither fraud nor conspiracy can be inferred. Mr. José R. Peralta, manager of the petitioning partnership was present at the office of Fernando Zapater, the attorney for Mario Mercado e Hijos, when Manuel Francisco Lluberas, acting for Elvira Olivieri Commins was negotiating the payment of the amount of the four promissory notes to the holders thereof, i.e. to the Heirs of José Tous Soto, as well as the cancellation by the latters of the mortgage securing said notes (Rec. 140-145).

Nowhere in the Registry of Property did the said "Option to Purchase and Sell and to Lease" continued in full force and effect in favor of any one person, after the mortgage had been cancelled (see Exhibit "5" for defendants, Rec. p. 312; Exhibit "9" for defendants, Rec. pp. 470-471. See also Sections 1 and 2, and 24-50, inclusive, of the Mortgage Law).

What right, if any, had partnership Mario Mercado e Hijos on April 8, 1937, i.e., three years, ten months and twenty-eight days after it had parted with the four promissory notes and with the mortgage securing them, to bring a suit alleging conspiracy and fraud and asserting supposed rights under the "Option to Purchase and Sell and to Lease" clause contained in the mortgage deed (Exhibit "J" for plaintiffs, Rec. 322-329), which mortgage Mario Mercado e Hijos had conveyed and assigned to the Heirs of José Tous Soto on March 9, 1937 (Exhibit "2" for defendants, Rec. 397-411)?

A chronological statement of the facts can be found in Appendix II, appearing at the end of this brief (Infra, pp. 62-70).

The fact that partnership Mario Mercado e Hijos and its managing partner Mario Mercado Montalvo in his private capacity had bound themselves as joint sureties or had as-

sumed certain obligations in behalf of the Heirs of José Tous Soto in the deed whereby Mario Mercado e Hijos had conveyed or assigned to the said heirs the mortgage credit owned by Elvira Olivieri Commins, to wit, to guarantee the payment of the monthly interest and the taxes levied upon the mortgaged properties when becoming due, did not create any right in favor of the partnership Mario Mercado e Hijos over the "Option to Purchase and Sell and to Lease" that it had conveyed and assigned by the said deed. Such obligations were assumed by said partnership in consideration that it kept and received for itself a commission of three-fourths of one *per cent* of the interest yielded by the principal owed. Elvira Olivieri Commins was not a party to the deed whereby the mortgage credit was so conveyed and assigned [3] and the contracting parties thereto were at liberty to fix the conditions they deem most advisable. (Sections 1044 and 1207, Civil Code, 1930 ed.).

The will of the parties, as evinced from the contract, should the latter be valid, is the law of the case. 19 Scaevola 674; 8 Manresa 669 (1929 ed.); 20 Scaevola 882, 912; Judgment of the Supreme Court of Spain dated April 17, 1873, 27 *Jurisprudencia Civil* 592; *Wade* v. *Texarkana Bldg., etc.*, 233 S. W. 937; *New Richmond Land Co.* v. *Ivanovich*, 198 Pac. 221; *Spokane Canal Co.* v. *Coffman*, 103 Pac. 1106.

The foregoing paragraph is taken from *Clausells* v. *Salas*, 51 P. R. R. 87, 91.

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[3] In *Caribbean Engineering Co.* v. *Municipality of Ponce*, 60 P. R. R. 26, the Supreme Court of Puerto Rico held:

"Contracts—Modification—Right to Modify.—The contracting parties cannot by stipulation limit the scope of the terms of the contract without the consent of a third person, who participated in the agreement by approving it and without whose intervention and approval the contract would not have been made.

"Stipulations—Construction, Operation and Effect.—In construing a stipulation, a court cannot add to the scope thereof by extending it beyond its own terms and the intention of the parties."

In the same way that Mario Mercado e Hijos had fixed those conditions in the deed whereby it conveyed and assigned the mortgage credit, with a view to making a profit of three-fourths of one *per cent* on the interest yielded by the principal, it could as well have also set down therein the condition that it reserved the rights under the "Option to Purchase and Sell and to Lease" clause contained in the mortgage deed. If being in a position to then and there fix such a condition, Mario Mercado e Hijos failed to do so, it has to abide by the consequences of its own act or conduct. In weighing the evidence and refusing to give any probative force (Rec. 42) to Exhibits "E" and "F" for plaintiffs (Rec. 281-302), the District Court of Ponce complied with the law. Petitioner's stand in complaining of such an action on the part of the trial court, is childish (Petitioner's brief pp. 12-13).

The sale made by Elvira Olivieri Commins of her "Indios" property to the defendants Lluberas-Passarell, and the lease by her made of the estate "Juanita" to codefendant Emilio Blasini Totti, was not a friendly or family affair. It was a licit transaction. Elvira Olivieri Commins was free to dispose of her properties, and defendants Lluberas-Passarell and Blasini, were at liberty to purchase and to lease the said properties as they did, as nothing appeared from the records in the registry of property of Ponce preventing them from so doing. Any hidden agreement between Mario Mercado and the Heirs of José Tous Soto could not be binding on any other person. (Exhibit "9" for defendants, Rec. 460-472.) *Nuiskamp* v. *Tagin Co.*, 121 U. S. 310, 319, 30 L. Ed. 971. Partnership Mario Mercado e Hijos imposed upon the mortgagor the "Option to Purchase and Sell and to Lease" clause in the mortgage deed, moved by its eagerness to acquire and control lands in excess of the 9520 acres which said partnership already owned and controlled as it appears from the suit brought

by The People of Puerto Rico, for a violation of the agrarian policy of this Island. Act No. 26 of 1941; *People of Puerto Rico* v. *Rubert Hermanos*, 309 U. S. 543, 84 L. Ed. 916; *People of Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 480-482.

The petitioner can not acquire at present, either as owner or for its control, the "Indios" property composed of more than 400 acres of land, nor could it control through lease the "Juanita" property composed of more than 450 acres, since Joint Resolution of Congress, approved on May 1, 1900 (31 Stat. at Large 715, supplementing the Foraker Act of April 12, 1900, 31 Stat. at Large 77, Chap. 191) and Section 58 of Act No. 26, approved by the Legislature of Puerto Rico on April 12, 1941, as amended by Act No. 160, approved on May 14, 1943 (Session Laws of that year, page 520), expressly forbids said partnership to do so. (See Appendix 1, at end of this brief); even though Mario Mercado e Hijos claims were lawful, and we maintain they are not, the remedy by certiorari would be academic, inasmuch as the said Joint Resolution of Congress and Section 58 of the Land Act in force in Puerto Rico expressly prohibits any partnership or corporation dedicated to agriculture to own or possess lands in excess of 500 acres.

District Court's Opinion.

Very skillful, indeed, but without any foundation in law, are the arguments adduced by petitioner on commenting the opinions of the District Court of Ponce and that of the Supreme Court of Puerto Rico.

The "Statement of the Case" and the "Findings of Fact" (Rec. 31-44) comply with the provisions of law in force in Puerto Rico. The District Court of Ponce omitted nothing that was necessary to make itself clear or understood considering the evidence adduced by the parties to the suit and statute or statutes applicable thereto. If

plaintiff, the petitioner herein, did not agree with the findings in the "Opinion and Statement of the Case" of the said district court as well as with those in the opinion of the Supreme Court of Puerto Rico, it should have asked that said findings and judgments be broadened, modified or reconsidered. Plaintiff failed to do so, and cannot now ask that it be protected from its own fault or negligence.

The argument employed by petitioner is ridiculous when it repeatedly says in its brief as follows:

> "All the respondents were advised of the right of option to purchase and lease held by Mario Mercado e Hijos concerning the estates 'Juanita' and 'Indios' ". (Brief 10-14.)

It is true that the defendants knew that the partnership Mario Mercado e Hijos had the right, under the option, to purchase and to lease the "Indios" and "Juanita" properties belonging to Elvira Olivieri Commins, but they also knew, and so they testified to it in the District Court of Ponce, that the referred to partnership Mario Mercado e Hijos had alienated those rights on conveying and assigning to the Heirs of José Tous Soto the four promissory notes and the mortgage securing them. (Rec. 90-93, 102-103, Olivieri Commins' testimony; Rec. 110-122, Lluberas' testimony.)

The District Court of Ponce gave to the deed conveying and assigning the mortgage credit the true probatory value that it had (Exhibit "2" for defendant, Rec. 397-411) as well as to the notice that the attorney for Mario Mercado e Hijos had served on Elvira Olivieri Commins of the conveyance and assignment of the said mortgage credit (Exhibit "3" for defendant, Rec. 412-413). That notice was served in pursuance to the provisions of Section 162 of the Mortgage Law and of Section 185 of the Regulations for its Execution to the effects contemplated by Section 187

of the said Regulations for the Execution of the Mortgage Law.

The petitioner speculates on and misrepresents the intervention that partnership Mario Mercado e Hijos had in the division or partition of the "Indios" and "Juanita" properties between Elvira Olivieri Commins and Santia Olivieri Commins, as per deed No. 33 of March 20, 1936 (Exhibit "A" for plaintiff, Rec. 255-256). Such intervention is explained by the fact that, at that time, the partnership Mario Mercado e Hijos was the mortgage creditor of Santia Olivieri Commins, that the shares which the referred to Santia Olivieri Commins had in the "Indios" and "Juanita" properties were mortgaged to that partnership, and that in this mortgage contract Mario Mercado e Hijos had forced upon the mortgagor a clause similar to the option to purchase and sell and to lease clause contained in the mortgage contract entered into between Elvira Olivieri Commins and Mario Mercado e Hijos (Rec. 227-236). As far as Santia Oliviero Commins was concerned, the intervention of the partnership Mario Mercado e Hijos in the said deed of partition was a legitimate one, but it was not so as far as it concerned Elvira Olivieri Commins who owed nothing at that time to Mario Mercado e Hijos.

A thorough study and consideration of all the questions involved in this case on the part of the Supreme Court appears from the facts to which petitioner refers on pages 11 and 13 of its brief (Rec. 375-388).

The Honorable Roberto H. Todd, Jr., the judge who presided over and rendered judgment dismissing the complaint in an unlawful detainer suit brought by the plaintiff before the District Court of Ponce in 1937, and which judgment was affirmed by the Supreme Court of Puerto Rico through an opinion delivered by Mr. Chief Justice Del Toro (*Llubetas* v. *Mario Mercado e Hijos*, 55 P. R. R.

39), later on became a member of the Supreme Court of Puerto Rico and took part in the resolution and disposition of the instant case by the said Court.

Neither the judgment rendered by the District Court of Ponce in the unlawful detainer suit nor the judgment of the Supreme Court dismissing the appeal taken therefrom, constitutes *res judicata*. Both the District Court of Ponce and the Supreme Court of Puerto Rico in considering the questions involved in the unlawful detainer suit, did not go to the merits of the contentions in the present suit.[4]

Statutes.

The constitutional guarantee as to due process of law referred to by petitioner on page 15 of its brief, should always be borne in mind when justice is to be done. The provisions of the Civil Code, of the Law of Evidence and of the Mortgage Law referred to by the petitioner in its Appendix 1, at pages 33-36, are applicable to the case at bar.

In addition to the sections of the Civil Code therein mentioned, we now invoke Sections 1066, 1110, 1213, 1226, 1227, 1228, 1229, 1418, 1419 and 1420 of the referred to Code (1930 ed.). These Sections as well as Sections 185, 186 and 187 of the Regulations for the Execution of the Mortgage Law in force in Puerto Rico are copied in the Appendix No. 1.

Position of Opponents Herein.

The defendants, by their undersigned attorney, strongly oppose to the granting of the writ of certiorari prayed for and also to the alternative petition that a writ of *man-*

[4] "Whether said option is void or not; whether or not it was ceded to the heirs of Tous Soto and the effect that deed number 72 of ratification executed on March 31st, 1937, may have, are matters which we do not decide in this case because we think as we have said before that they must be decided in case number 311 *supra*."

damus be issued to the Circuit Court of Appeals for the First Circuit to reinstate the appeal and to consider the case on its merits, among other grounds, for the following:

First: Because the contention of the petitioner is without merits as this Honorable Court will verify from an examination of the record on appeal of the particulars pointed out by the petitioner.

The opponents answer to those particulars in their "Statement" (supra, p. 3) and in their observations as to the correctness and soundness of the judgments rendered by the District Court of Ponce and by the Supreme Court of Puerto Rico. (See, supra, p. 12).

The conclusion reached by the judge of the District Court of Ponce, who personally saw, observed and heard the witnesses giving testimony at the trial, and the conclusion reached by the Supreme Court of Puerto Rico on the testimony of those witnesses (Rec. 78-218) and the documentary evidence presented at the trial, as well as the construction placed upon, and application made of, the different local statutes involved to the facts of the case, should not be interfered with or be substituted by an appellate court. This is a well settled rule. There is nothing unusual or exceptional in the instant case warranting a departure from that rule or any reason why it should not be adhered to, especially in view of the fact that the five judges of the Supreme Court of Puerto Rico—as already stated two of them having had previous participation in this same case by considering and weighing the facts therein and applying the statutes thereto—had sustained the conclusions of the trial judge of the District Court of Ponce on rendering the judgment of which the petitioner now complains of.[5]

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[5] "This statute was enacted in May, 1938. The law at that time as to the review of findings of fact in equity was, as stated by Mr. Justice Brandeis for the Court, 'in equity', matters of fact as well as of law are reviewable. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 675, 71 L.

Second:—The Circuit Court of Appeals has inherent power to adopt rules of the nature and to the extent of Rule 39(b). The rule is reasonable and does not either extend or limit the jurisdiction of the referred to court. It expedites the prompt decision of cases before the court and contemplates a rapid administration of justice. In the instant case that rule remedied a grave situation created by petitioner and put a stop to a manifest abuse committed by it. For seven long years the petitioning partnership had unlawfully been, and still is in possession, without any right or title thereto, of the properties belonging to the defendants, and had, during all that time, been enjoying the fruits and rents of the said properties without paying any rentals to the defendants.

The Circuit Court of Appeals for the First Circuit correctly followed the recommendation as to local law made by this Honorable Court in the case of *Sancho Bonet, Treas.* v. *The Texas Co.*, 308 U. S. 463, 460-472).

Third:—The Circuit Court of Appeals exercised its own criteria and discretion in rendering judgment in the instant case (Rec. 518). All presumptions of law are in favor of that judgment. There is no doubt that, in rendering its judgment, the Circuit Court passed upon petitioner's "Statement of Points" and "Statement of Appeal" aforesaid.

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ed. 463, 472, 47 S. Ct. 222. Findings of fact by the trial judge of course were presumptively correct and were accepted by reviewing courts unless clearly wrong. *Butte & S. Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12, 30, 63 L. ed. 447, 459, 39 S. Ct. 231. This rule, however, did not deny power to the Circuit Court of Appeals to review facts, but rather went to the weight to be accorded to the findings of a lower court and had special pertinence where credibility of witnesses was involved. This Court had 'a well settled rule that 'when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous.'" *Baker* v. *Schofield*, 243 U. S. 114, 118, 61 L. ed. 626, 630, 37 S. Ct. 333. Cited with approval in *District of Columbia* v. *Pace*, 88 L. ed. 321.

Fourth: The fact that in other cases the Circuit Court of Appeals had refused to dismiss an appeal on the ground that no questions of purely local law were involved therein, and had decided them on their merits, shows that the said court properly exercised its judicial discretion in the instant case and that, when meritorious contentions are presented thereto, the court goes to their merits. Where the contentions are frivolous, the court's action in dismissing the appeal is proper.

Fifth: In dismissing petitioner's appeal, the Circuit Court of Appeals exercised its jurisdiction properly too. The petitioner had the opportunity to ask that the judgment rendered by the Circuit Court of Appeals be reconsidered and to file brief therefor, but failed to do so. The petitioner had not been denied the equal protection of the laws nor a due process of law. What the petitioner has not been allowed to do is to perpetuate her conduct of having wrongfully taken possession of the properties of the defendants. Neither Section 2 of the Organic Act of Puerto Rico, nor the Fifth Amendment of the Constitution of the United States, have the wide scope that petitioner pretends they have, nor can the petitioner be encouraged in its wrongful acts.

Sixth: We affirm that the petitioner had all the opportunities to present its case in due form before the Circuit Court of Appeals for the First Circuit, but failed to do so. Nowhere in the record appears that the petitioner had asked for a reconsideration of the judgment rendered by that court, pursuant to Rule 39(b), nor that it had filed brief or demanded an opportunity to argue the case before the Circuit Court of Appeals.

Seventh: The judgment of the Supreme Court of Puerto Rico, affirming the judgment of the District Court of Ponce, is supported by the evidence and by the local laws governing the questions involved in the case and should be upheld by this Honorable Court.

Reasons Why the Remedy Should Not Be Granted.

On a thorough analysis of the attendant circumstances, as they are shown above, the instant case is not a proper one to annul Rule 39(b) of the Circuit Court of Appeals for the First Circuit. Considering the attendant circumstances aforesaid, the rule constitutes a safeguard to litigants and is remedial as it tends to remedy a serious situation created by the petitioner, a partnership operating against the agrarian policy of Puerto Rico that, not being satisfied with the agricultural lands it already owns and controls to the prejudice of the community in general, wishes to keep on acquiring and controlling more agricultural lands in open violation of the laws prohibiting such ownership and control in excess of the statutory 500 acres.

Petitioner Mario Mercado e Hijos had no right whatever over the "Option to Purchase and Sell and to Lease" clause when it brought the present suit in the District Court of Ponce. Notwithstanding the fact that it had no right nor was entitled to maintain this suit, the petitioner has enjoyed all the constitutional and statutory guarantees given to litigants in the defense of their eventual rights. No error of procedure has been committed by the Circuit Court of Appeals or by the Insular Courts, and therefore, neither the writ of certiorari prayed for should be granted, nor the appeal be ordered reinstated in the Circuit Court of Appeals for the First Circuit. Such action would only prolong indefinitely the conduct of the petitioner, that for the last seven years has been in the wrongful possession of the properties of the defendants, to the prejudice of their rights. The judgment of the Circuit Court of Appeals is correct.

For The Foregoing Reasons, we pray this Honorable

Court that the petition for a writ of certiorari be dismissed.

In Ponce, Puerto Rico., for Washington, D. C., this the —— of April, 1944.

C. DOMINGUEZ RUBIO,
Counsel for respondents,
Guayama, P. R.

LUIS LOPEZ DE VICTORIA, *Yauco, P. R.*
JOSE SABATER, *Mayaguez, P. R.*
LEOPOLDO TORMES GARCIA, *Ponce, P. R.*
Of Counsel.

By: LEOPOLDO TORMES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 497

MARIO MERCADO E HIJOS,

Petitioner,

vs.

ELVIRA OLIVIERI COMMINS, MANUEL FRANCISCO LLUBERAS, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN SUPPORT OF SUGGESTIONS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Opinion Below.

The Supreme Court of Puerto Rico found the facts in the case were so clearly stated and the issues involved had been so well disposed of by the District Court of Ponce (Rec. 31-44), that it adopted the lower court's opinion and, resting on the reasons given by the trial court for its decision, unanimously affirmed the judgment of said court. (Rec. 474-477). 60 D.P.R. 877-890.

The Circuit Court of Appeals for the First Circuit was justified in dismissing an appeal, taken from the Supreme Court's judgment that was frivolous and groundless, as was also the suit herein brought by the petitioner. In taking such action, the Circuit Court properly applied Rule 39(b). (Rec. 518.)

Neither the District Court of Ponce, nor the Supreme Court of Puerto Rico had considered, nor could they have considered, the questions involved in the instant case when they entertained and decided the unlawful detainer suit referred to by the petitioner on page 21 of its brief. On delivering their opinions in the unlawful detainer suit—in said suit the sole question involved was the right to possession on the part of partnership Mario Mercado e Hijos over the properties "Indios" and "Juanita" under a previous contract of lease (Rec. 225-224)—both the District Court of Ponce and the Supreme Court of Puerto Rico were very careful on the questions decided therein. The District Court of Ponce (Judge Todd, Jr.) in making reference to the *Option*, expressed itself as follows:

> "Whether said option is void or not; whether or not it was ceded to the heirs of Tous Soto and the effect that deed number 72 of ratification executed on March 31st, 1937, may have, are matters which we do not decide in this case because we think, as we have said before, that they must be decided in case number 311, *supra*." *Lluberas* v. *Mario Mercado e Hijos*, 55 P.R.R. 39, 43.

On affirming the judgment rendered by the District Court of Ponce (55 P.R.R. 42-43), the Supreme Court of Puerto Rico copied in part the opinion of the trial court as a ground for its affirmance, and took the same views and position that the District Court of Ponce had taken as to the determination and disposition of the case.

This shows how groundless are the arguments of the petitioner when imputing errors to the District Court of Ponce and to the Supreme Court of Puerto Rico in the instant suit for rescission.

Jurisdiction.

Defendants have no doubts that this Court may review, by certiorari, the judgment of the Circuit Court of Appeals. It is regrettable, however, that such jurisdiction be exercised in connection with a petition resting on fallacies and subtleties that practically amount to professional malpractice.

Question Presented.

None of the questions presented by the petitioner rest on solid legal grounds. The facts upon which partnership Mario Mercado e Hijos bases the petition for certiorari are illusory and untenable under our statements made under subdivision "QUESTION PRESENTED" (supra, 2).

Statutes.

As already stated, there is no constitutional nor federal question involved in the instant case. The petitioner has in no way been deprived of any right guaranteed by the Constitution or by the federal statutes in force in Puerto Rico. It cannot seriously contend that it had not been afforded protection under the insular statutes. The Federal Constitution and the insular laws have been enacted to protect citizens in their rights when such rights have been violated, not to consecrate or to perpetuate abuses of power, nor to encourage violations of the laws. The sections of the laws applicable to and necessary for a determination of the questions presented, are cited in Appendix I (infra, 42).

Specification of Errors By Petitioner.

No such errors exist. They are imaginary, and based on speculations.

Summary Arguments of Respondents.

They have been answered by the defendants on explaining their position in the case. (Supra, 15).

Statement of the Case of Respondent's Position.

Petitioner's "STATEMENT OF THE CASE" is not supported in any way by the record.

A chronological statement of facts in opposition to those stated by the petitioner, appears in Appendix II. (Infra, 62).

Opinion of the District Court of Ponce and of the Supreme Court of Puerto Rico.

The District Court of Ponce (i.e. the trial court) dismissed, as groundless, the contentions of petitioner. (Rec. 31-45). The Supreme Court of Puerto Rico rejected petitioner's contentions, based on local statutes in force in Puerto Rico applicable to the facts of the case as they appeared from the record on appeal, and, by a unanimous opinion, affirmed the judgment rendered by the said District Court of Ponce (trial court). (Rec. 474-488).

The Circuit Court of Appeals for the First Circuit affirmed the judgment of our Supreme Court. (Unanimous opinion). (Rec. 518.)

Argument.

POINT I.

The petitioner contends that the judgment rendered by the Supreme Court of Puerto Rico "was clearly wrong; even patently erroneous; or ineseapably wrong."

A-B. We shall not follow petitioner's way of arguing which consists of making assertions that are untenable. In the brief in support of its contentions, petitioner refers to isolated portions of the opinions delivered by the District Court of Ponce and the Supreme Court of Puerto Rico. Defendants ***KNEW*** that partnership Mario Mercado e Hijos HAD a right to the OPTION to purchase and to lease the "Indios" and "Juanita" properties, *but they also knew*, and they testified thereto, (Rec. 93-103; 111-112) that the said partnership had alienated and parted with the said right by having conveyed and assigned it to the Heirs of José Tous Soto by public deed dated May 9, 1933 (Exhibit "2" for the defendants, Rec. 397-411). The relevant part of said deed recites as follows:

> "Mr. Mario Mercado y Montalvo, as the sole managing partner of the agricultural civil partnership known as Mario Mercado e Hijos, hereby *conveys, renounces and assigns* in favor of Mrs. Belén González, widow of Tous, in the representation in which she appears in this execution and *in her own right*, and to doña Ana Rosa Tous de Carrión, Doñ Luz Belén Tous de Usera, Doña Alicia and Doña Celia Tous y González, the mortgage credit constituted by the deed above transcribed, *the assignor subrogating the assignees to its rights in the same degree and priorities by delivering to them in this act* and in my presence and that of the witnesses the four mortgage promissory notes above mentioned duly endorsed, to all of which, I, the Notary, certify. (Rec. 406.)

Notary Fernando Zapater, attorney for petitioner Mario Mercado e Hijos, complying with the terms of Section 152 of the Mortgage Law, served notice on the mortgagor, Elvira Olivieri Commins, of the assignment of the mortgage credit, as follows:

"(Exhibit "3" of the defendants).

"Attorney Fernando Zapater Martinez, Attorney and Notary Public. Ponce, Puerto Rico.

"Notice of Assignment.

"Mrs. Elvira Olivieri Commins, Maygüez, Puerto Rico:

"You are hereby notified that on even date Mr. Mario Mercado Montalvo, as manager of the partnership Mario Mercado e Hijos and by deed executed before me and marked No. 33, has assigned in favor of the Heirs of José Tous Soto, the mortgage credit constituted by you in favor of the latter by indorsement of four mortgage promissory notes subscribed by you on March 23, 1932, notes marked 1, 2 and 3 for the sums of $10,000.00 as principal, $2,700.00 for interest and $500.00 for costs, respectively, and not marked 4, for $11,256.89, as principal, $3,000.00 for interest and $500.00 for costs, which promissory notes were held by the aforesaid partnership, which mortgage was constituted by you by deed No. 13, executed before Notary José Tous Soto on March 23, 1932, upon the on-half joint interests held by you in the estates known as "Juanita", lying in the 'Pueblo' and "Quebrada' barrios of the municipal district of Guayanilla, with an area of 481 cuerdas, and estate known as 'Los Indios", lying in the 'Indios' barrio, of Guayanilla, with an area of 430 cuerdas, an unverified copy of said deed of assignment being enclosed herewith. Ponce, Puerto Rico, May 9, 1933. (Sgd.) F. Zapater, Notary-Public.

"I, HEREBY CERTIFY: That on even date and prior to the collection of the mail for the city of Mayagüez, Puerto Rico, I deposited in the post office of Ponce an envelope duly sealed and with the proper postage enclosing a true and faithful copy of the deed of assignment referred to in the foregoing notice, as well as of this Notice of Assignment addressed as follows: 'Mrs. Elvira Olivieri Commins, Mayagüez, Puerto Rico.' That between Ponce and Mayagüez there is a regular daily mail service. Ponce, Puerto Rico, May 10, 1933. (Sgd.) F. Zapater, Notary-Public. There is stamped hereon the notarial seal)" (Rec. 412-413).

Said assignment of the mortgage credit was recorded in the Registry of Property of Ponce, in favor of the Heirs or Succession of José Tous Soto, but nowhere in the record entry made in the Registry of Property could the alleged reservation by Mario Mercado e Hijos to the "Option to Purchase and Sell and to Lease" clause appear (Rec. 460-471.)[1]

Such reservation of the option clause did not exist, and hence could not appear in, nor did it appear from either the deed assigning the mortgage or from the record entry of the said assignment in the Registry.

The clear and unequivocal language in the deed of "Assignment of Mortgage Credit", and the notice of the assignment served by petitioner's attorney and agent, allows no room for inference whatever (Sections 468-471 of the Code of Civil Procedure, 1933 ed.) as to the alleged intention on the part of partnership Mario Mercado e Hijos of having reserved for itself any right over the "Option to Purchase and Sell and to Lease" clause in the mortgage deed. The provisions of Section 1233 of the Civil Code[2] are not applicable to such a clear and unequivocal language nor do they play any part in connection with those documents. The provisions of law applicable to such a situation and to

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[1] The alleged reservation on the part of the petitioner, Mario Mercado e Hijos, as to the option clause does not appear from the text of the record entries in the Registry of Property of Ponce It is so stated by the Registrar of Property of Ponce in a certificate that says:

"(3) That it does not appear from the records just transcribed, to which the aforesaid deeds gave rise, that the partnership Mario Mercado e Hijos, or anybody else, has reserved to itself the option to purchase and lease referred to in the record of the mortgage which has been assigned and cancelled." (Rec. 471.)

[2] "Section 1233.—If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed.

"If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail."

the acts of the petitioner are Section 388, and subdivisions 2 and 3 of Section 463 of the Code of Civil Procedure (1933 ed.).[3]

C. On assigning by deed to the Heirs of José Tous Soto, the promissory notes owned by Elvira Olivieri Commins, together with the mortgage securing them (Rec. 397-411), without a reservation on the part of partnership Mario Mercado e Hijos over the option clause, the referred to partnership and the Heirs of José Tous Soto included in the deed of assignment ALL THE CONDITIONS they deemed most advantageous to each. The Insular Court correctly applied the provisions of Section 1418 of the Civil Code, in relation with Sections 1419 and 1420 of that same Code (1930 ed.) to that negotiation.[4] (See Appendix I, *infra*).

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[3] "Section 388.—In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

"Section 463.—The following presumptions, and no others, are deemed conclusive:

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

"3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he can not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

[4] "Section 1418.—The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

"Section 1419.—A vendor in good faith shall be liable for the existence and legitimacy of the credit at the time of the sale unless it should have been sold as doubtful, but he shall not be liable for the solvency of the debtor unless it has been expressly stipulated, or if the insolvency should be prior and public.

"Even in these cases he shall only be liable for the price received and for the expenses mentioned in number 1 of section 1407.

"The vendor in bad faith shall always be liable for the payment of all the expenses, and for the losses and damages.

"Section 1420—If the assignor in good faith should have made himself liable for the solvency of the debtor, and the contracting parties should not have stipulated anything with regard to the duration of the liability,

According to those sections of the Civil Code, Mario Mercado e Hijos was the assignor in GOOD FAITH of a mortgage credit, and as such was legally liable for the existence and legitimacy of the credit. That obligation created by law, and those obligations that arose out, thereby assumed by partnership Mario Mercado e Hijos in the contract of ASSIGNMENT OF THE MORTGAGE CREDIT did not entitle the petitioning partnership to be a part owner of the mortgage credit which, of its own volition and with a view to obtain a profit in the negotiation thereof, it had *totally* conveyed and assigned to the Heirs of José Tous Soto in consideration of the sum of $41,256.89, paid by them to partnership Mario Mercado e Hijos. That sum was later on paid over in full by the mortgagor to the Heirs of José Tous Soto, and the mortgage securing the promissory notes was totally cancelled (Rec. 312-321). Neither the partnership Mario Mercado e Hijos, nor any of its partners or agents, had any intervention whatever in the negotiations for the cancellation of the mortgage. The cancellation produced its legal effects in the Registry of Property (Rec. 460-471).

In addition to what we have stated, and to avoid repetitions, we shall later on explain why Mario Mercado e Hijos retained the three-fourths of one *per cent* interest on the principal owed by Elvira Olivieri Commins to the Heirs of José Tous Soto since August, 1933. Be it stated that Mario Mercado e Hijos did not receive the proceeds from the said interest from the moment that Elvira Olivieri Commins, the mortgagor, paid the principal so owed to the Heirs of Tous Soto, her sole creditors then.

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it shall last one year only, to be counted from the assignment of the credit if the period had already matured.

"If the credit should be payable within a term or period which has not yet expired, the liability shall cease one year after its maturity.

"Should the credit consist of a perpetual income, the liability shall be extinguished after ten years, counted from the date of the assignment."

D. We stated in this brief (ante, p. 25) the participation that partnership Mario Mercado e Hijos had in the deed, for the Partition of the "Indios" and "Juanita" properties, executed by the sisters Sanita and Elvira Olivieri Commins. Nowhere in the Partition Deed (Rec. 397-425) does it Appear that Elvira Olivieri Commins had acknowledged or conceded any rights to Partnership Mario Mercado e Hijos over the Option To Purchase And To Lease Clause embodied in the mortgage deed. The only relations at that time existing between the said partnership and Elvira Olivieri Commins were only those of lessor and lessee (Rec. 227). The relations between Sanita Olivieri Commins, a sister of Elvira, and the referred to partnership could in no way bind Elvira Olivieri Commins. In August 1936, when the said partition was made, the Heirs of Tous Soto were the sole owners of the promissory notes and of the mortgage securing them. Since May 9, 1933 (Rec. 397-412), by the deed assigning the mortgage credit, partnership Mario Mercado e Hijos had given notice of that fact to all the world. The only right that Mario Mercado e Hijos had on that date was to retain the proceeds of the three-fourths of one *per cent* of the monthly interest accruing from the principal then owed by Elvira Olivieri Commins to the Heirs of José Tous Soto. The money covering the said percentage on monthly interest referred to was neither delivered, nor paid by Elvira Olivieri Commins, to the partnership Mario Mercado e Hijos. Said partnership retained it from the $4,100 which it was bound to pay annually to Elvira Olivieri Commins as rental of the lease that it had over the "Indios" and "Juanita" properties owned by Elvira Olivieri Commins (Rec. 234, 326).

Had it been true that Mario Mercado e Hijos had reserved any right over the option clause embodied in the mortgage contract, or that the reservation of said right was a condition in the contract of Assignment Of The Mortgage Credit

owed by Elvira Olivieri Commins, why was not said reservation expressly stated, there being nothing to prevent it, as one of the conditions in the deed assigning the mortgage, and in which deed neither Elvira Olivieri Commins nor any of the other defendants intervened?

E. The District Court of Ponce said in its opinion:

> "When Mario Mercado e Hijos conveyed to the heirs of Tous Soto the said mortgage credit it made a special stipulation in regard to the interests on the credit, but it failed to make any reservation in regard to the clause of option to sell and lease. Nor was said clause mentioned by the heirs of Tous Soto when it applied to this court for leave to become the assignee of the credit, nor either when leave was sought for the cancellation of said credit by said heirs:
>
> "Neither deed No. 72 of May 31, 1937, executed before notary Zapater, regarding ratification of mortgage credit by the heirs of Tous Soto (Exhibit F of the plaintiff) nor the proceedings No. 299, before this court, regarding the approval of said deed, has any weight in the present cases, because said deed No. 72 was executed after the total cancellation of the mortgage credit by the heirs of Tous Soto.
>
> "For the foregoing, we come to the conclusion that 'when Mario Mercado e Hijos conveyed to the heirs of Tous Soto the mortgage credit, it also conveyed the rights embodied in clause 7 of option to sell and lease' " (Rec. 41-42).

To the agreements entered into, later on, by the Heirs of José Tous Soto and partnership Mario Mercado e Hijos in connection with the option clause, the trial court gave no probative force. The District Court of Ponce correctly weighed the documentary and oral evidence submitted to it. In the unanimous opinion delivered by Mr. Chief Justice Del Toro affirming the judgment of the District Court of Ponce, the Supreme Court of Puerto Rico said as follows:

"If the plaintiff when assigning its promissory notes to the Heirs of Tous Soto had expressly reserved to itself the right of option and if when recording the assignment it had recorded such reservation in the registry, then it would have been entitled to claim knowledge of such reservation on the part of defendants with all the consequences that might arise as against them. The record of the original contract in the registry and that of the second contract without any reservation in regard to option, entitled the defendants to proceed as regards the plaintiff in accordance with their construction of the statute. And we have already seen that according to the statute the assignment without reservation of the mortgage notes carried with that of the option. Therefore, if the defendants resolved to assume any risk towards the plaintiff when acting in the way they did, such risk entirely disappeared when the legal precept applicable thereto was established.

"The appeals must be dismissed and the judgments appealed from affirmed.

"(Sgd.) Emilio Del Toro, Chief Justice."

(Rec. 487.)

The foregoing excerpt from the opinion of the Supreme Court of Puerto Rico sufficiently answers the groundless arguments adduced by petitioner in its attempts to construe provisions of law in force in Puerto Rico and to apply them to the facts of the case appearing from the record.

Point II.

A.—The insular courts correctly construed and applied Section 1759 of the Civil Code (1930 ed.) to the facts of the instant case.[5]

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[5] "Section 1759.—The pledge and the mortgage are indivisible, even if the debt should be divided among the legal representatives of the debtor or of the creditor.

"Therefore, an heir of the debtor who may have paid a part of the debt can not request that the pledge or mortgage be proportionately extinguished as long as the debt has not been paid in full.

It is elementary in law, that a mortgage is *indivisible*. The absolute terms by which Mario Mercado e Hijos conveyed and assigned the four promissory notes and the mortgage securing them to the Heirs of José Tous Soto, subrogating the said heirs *in the place, degree or priority* in which Mario Mercado e Hijos (Rec. 406) stood as to the said promissory notes and mortgage, speaks for itself, and requires no further comment. *United Firemen's Ins. Co.* v. *Registrar*, 44 P. R. R. 816.

The mortgage credit, that is, the principal secured by the mortgage may be divided among various creditors or different installments may be stipulated for paying such principal; but the accessory, secondary and subsidiary contract of mortgage is one and indivisible and follows the whole or any part of the principal obligation wherever it goes to.

The mortgage was constituted in clause 2 of the mortgage deed (Exhibit "J" for plaintiff, Rec. 325) to secure all and each of the promissory notes issued and to secure not only the principal owed, but also an additional sum for interest on the said principal and for costs, expenses, disbursements and attorneys' fees in case of judicial recovery.

The mortgage was not constituted to secure the option to purchase and sell and to lease. Neither was it constituted to secure the waiver of homestead, nor to secure other waivers made and securities or warranties given by the mortgagor to the mortgagee in the said mortgage deed.

"Neither can the heir of the creditor, who received his part of the debt, return the pledge nor cancel the mortgage to the prejudice of the other heirs who have not been paid.

From these provisions is excepted the case in which there are several things given in mortgage or pledge and each of them secures only a specified part of the credit.

The debtor in such case shall be entitled to have the pledge or mortgage extinguished in proportion as he pays the part of the debt for which each thing is specially liable."

The option, the waiver of homestead and the other waivers made and securities given were embodied in the mortgage. They cannot be separated, or segregated, from the said mortgage; they are an indivisible part thereof, and, therefore, plaintiff could not assign the said mortgage credit in full and still reserve for itself the benefit of the waiver of homestead or reserve for itself the option independently of the mortgage.

B.—The negotiation whereby partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes secured with mortgage owed by Elvira Olivieri Commins and the mortgage securing the payment of the full amount of the referred to promissory notes, without making any reservation to the Option to Purchase and Sell and to Lease clause that was embodied in and formed an integral part of the mortgage (Rec. 397-411) speaks for itself. The terms under which the assignment was made are clear and were fully complied with and observed by all the parties. The petitioning partnership had only reserved, by agreement with the Heirs of Tous Soto, the right to retain three-fourths of one *per cent* of the interest accruing monthly on the principal owed by Elvira Olivieri Commins (Rec. 406). The three-fourths of one *per cent* on the interest was retained by Mario Mercado e Hijos while Elvira Olivieri Commins owed the principal secured with mortgage to the Heirs of José Tous Soto. Elvira Olivieri Commins paid the said principal to the Heirs of José Tous Soto and, with the authorization of the District Court of Ponce (Rec. 425-451), the said heirs *totally* cancelled the mortgage securing the promissory notes. Partnership Mario Mercado e Hijos had no intervention therein (Rec. 312-313). From the date in which the mortgage credit was cancelled, partnership Mario Mercado e Hijos had no right to retain any part of the rents that it was bound to pay to Elvira Olivieri

Commins, semi-annually, as lease rental of the "Indios" and "Juanita" properties (Rec. 326). The reservation that Mario Mercado e Hijos had made over the interests accruing on the principal of the mortgage owed, did not give the said partnership any rights over the mortgage. The partnership was only a debtor of Elvira Olivieri Commins, under the contract of lease of the "Indios" and "Juanita" properties belonging to her. That status of being such debtor under the lease contract existed independently of the mortgage, notwithstanding the provisions of Section 1112 of the Civil Code (1930 ed.) to the effect that any person may make a payment for the account of another.[6]

C.—Our arguments and citations made in subdivisions "A" and "B" of Point I (ante, 25), fully answer the arguments of the petitioner in subdivisions "A" and "B" of Point I of petitioner's brief.

D.—The petitioning partnership is not entitled to satisfy its ambitions through, and to make a case out, of a situation voluntarily created by its as above explained, to the detriment of the defendants and especially of the Lluberas-Passarell Brothers. If partnership Mario Mercado e Hijos had any interest in purchasing from Elvira Olivieri Commins the properties belonging to her, it should have had offered and paid for such properties their just and true value. Partnership Mario Mercado e Hijos wanted to take advantage of its position as creditor of Elvira Olivieri Commins, by forcing her to accept onerous conditions in the mortgage contract. Even though Elvira Olivieri Com-

[6] "Section 1112.—Any person, whether he has an interest or not in the fulfilment of the obligation, and whether the debtor knows and approves it or is not aware thereof, can make the payment.

"The person paying for the account of another may recover from the debtor what he may have paid, unless he has done it against his express will.

"In such case he can only recover from the debtor in so far as the payment has been useful to him."

mins knew that Mario Mercado e Hijos had no right over the Option to Purchase and Sell and to Lease clause since May 9, 1933 (Rec. 397 *et seq.*) she held many conversations with members and agents of Mario Mercado e Hijos, through a relative and agent of hers, Rafael Barletta, in an endeavor to sell and to lease her properties. Elvira Olivieri Commins was at liberty to look for purchasers. There was nothing barring her from doing so. She was at liberty to seek loans of money from other persons and to pay her debts to her creditors, i.e., to the Heirs of José Tous Soto, as she did, long before the promissory notes became due. Nothing existed in the way of prohibiting Elvira Olivieri Commins from taking proper steps toward such end. What Elvira Olivieri Commins never did was to surrender to the will of partnership Mario Mercado e Hijos. Said partnership had only offered her $28,400 for the property later on sold by her to the Lluberas-Passarell Brothers.

Point III.

A-B-C. Our arguments adduced in connection with the particulars discussed by petitioner in Point I, sufficiently answer those of the petitioner under subdivisions "A", "B" and "C" of Point III. Petitioner's arguments are a mere repetition of former arguments.

When on March 6, 1937, Elvira Olivieri Commins paid the full amount of the four promissory notes, she had secured with mortgage over her "Indios" and "Juanita" properties, she paid to her then legitimate creditors, the Heirs of José Tous Soto (Rec. 312, 425-454). The payment so made by Elvira Olivieri Commins had the legal effect of extinguishing the mortgage obligation. (Section 1010 of the Civil Code, 1930 ed.) [7]

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[7] "Second: By virtue of the terms of the foregoing clause, Mrs. Belén González, in her own right and in the representation assumed by her herein, conformable to the order of the District Court for the Judicial District of Ponce already transcribed, Doña Luz-Belén, Doña Ana-Rose, Doña Alicia,

The Heirs of José Tous Soto are not claiming anything from the defendants herein. Partnership Mario Mercado e Hijos is not entitled to claim any right that might have belonged to the Heirs of José Tous Soto. As to any such right, had it existed, the Heirs of Tous Soto were the only ones entitled to waive it, as they did in the instant case, by waiving three-month interest on the principal on receiving payment of the mortgage obligation long before the latter fell due (Rec. 312-327, 425-454).

Point IV.

A. B. C.—The Supreme Court of Puerto Rico complied with, and correctly applied, the local laws to the facts of the instant case as they appeared from the record. Our Island is governed by laws and not by the caprice or will of any individual or group of individuals acting against the law and applying later to the courts of justice for redress, in an attempt to have those laws construed in their favor, at their will and to their convenience.

Since 1937, the petitioning partnership had taken wrongful possession of the properties of the defendants. The untimely deposit made in court by that partnership before the District Court of Ponce, in an endeavor to pay thereby to the Lluberas-Passarell Brothers, defendants herein, the amount that they had paid over to Elvira Olivieri Commins as purchase price for the "Indios" property, does not en-

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Doña Celia, Doña Belén-María, Doña Gladys and Don Jorge Tous González, the first three parties with the express consent of their respective spouses Don Vicente Usera, Jr., Don José B. Carrión and Don Ignacio Maldonado, acknowledge as fully cancelled and extinguished the mortgage constituted by deed No. 13, dated March 23, 1932, executed before notary José Tous Soto, the attesting notary in said execution acting as a substitute, in favor of the partnership Mario Mercado e Hijos, and conveyed subsequently to the parties hereto by said deed No. 33, dated May 9, 1933, before me, such cancellation to be recorded in the proper registry of property conformable to the wish and consent of the parties." (Rec. pp. 318-319.)

title the said partnership to the enjoyment of that property. The said partnership had no right in regard to the option clause to purchase and sell and to lease embodied in the mortgage contract—as an integral part thereof—after it had voluntarily parted with the mortgage and the promissory notes that the said mortgage secured, by conveying and assigning them to the Heirs of José Tous Soto without making any express reservation in regard to said option.

It is worthwhile stating here that, as regards the mortgage credit to the Heirs of Tous Soto, judicial authorization was requested from the District Court of Ponce, as there were minors and an incapacitated person interested in the negotiation. It must be suggested that any reservation of rights then made, if any, was disclosed to the court so that, with full knowledge of the reservation, the court should finally decide whether or not the transaction was convenient and beneficial to the minors and whether or not the negotiation should be made. The right of option to purchase and sell and to lease, the subject of the alleged reservation, had as a consideration for it, the mortgage contract. That right was given as part of the consideration of the mortgage contract (Rec. 327). The fact that no disclosure was made to the court as to the alleged reservation herein, shows that no such reservation had been made at the time and that it did not exist. Had the reservation been made, i.e., had it existed, it would undoubtedly had been disclosed to the court, especially in view that it was so fundamentally important to Mario Mercado e Hijos. The present litigation attest to that importance. Parties entering into contracts look forward diligently to the protection of their rights or of those rights which they may possibly have thereunder. The usual and customary thing for them to do is to protect their rights, not to abandon them. If the alleged reservation was true, the parties to the negotiation should not have refrained from disclosing it to the court so that the court

and the minors would know that the assignment of the mortgage contract did not pass with it the option which was an integral part of the mortgage. Their silence amounted to fraud or deceit practiced upon the court as well as upon the minors who were then purchasing the mortgage credit. The mortgage credit to be assigned carried with it a recorded realty right—the option to purchase—in favor of the mortgagee, i.e., the minors as assignees of the said mortgage credit. The minors could not be deprived of such real right without the express authorization of the District Court of Ponce in the proceedings for authorization to assign the mortgage credit to such minors (Rec. 425-454). In other words, the mortgage creditor, Mario Mercado e Hijos, and the mother of the minors could not, without the district court's authorization, enter into any agreement whereby the original mortgage creditor (Mario Mercado e Hijos) was to keep for himself something that was a vital and integral part of the mortgage contract, to be assigned to the minors (*F. Zayas, S. en C.* v. *Torres*, 51 P. R. R. 772; *Cruz* v. *Central Pasto Viejo, Inc.*, 44 P. R. R. 354). The silence of the parties negotiating the assignment of the mortgage was a deceit upon the court as well as upon the minors. To hold that there was such a reservation, would amount to a protection of a fraud, to the benefit of a party to that fraud, i.e., of Mario Mercado e Hijos, a partnership that, according to its own pleadings had not come into court with clean hands as regards the assignment of the mortgage credit. It is not the mission of the courts to protect fraud or deceit. Litigants cannot reap any benefits arising out of their own fraud and deceit.

Point V.

A.—Rule 39(b) of the Circuit Court of Appeals for the First Circuit is VALID and has been properly and wisely applied to the facts in the case as they appear from the

record. The said Circuit Court made a proper use of its judicial discretion under the law, in her appreciation of the facts as they appear from the said record and as they were presented by petitioner in its "STATEMENT OF POINTS", and "STATEMENT OF APPEAL" (Rec. 495-498), in view of the defendents' motion (Rec. 514-518) to dismiss the appeal on the ground that said appeal was not justified and that it had been taken to hinder and delay the due administration of justice, and on the further ground that the judgment of the District Court of Ponce (Rec. 45), unanimously affirmed by the Supreme Court of Puerto Rico (Rec. 488), is not contrary to the law or to the facts as they appear from the evidence in the record as weighed by the trial court. The Circuit Court of Appeals for the First Circuit complied with and observed the due process clause of the Constitution. The petitioner had its day in court and had not been denied the equal protection of the laws. Petitioner's contentions have no support in the law and, therefore, the judgment was adverse to petitioner.

Before coming into this Honorable Supreme Court to sue out the writ of certiorari the petitioner should have moved the Circuit Court of Appeals for a reconsideration of its judgment affirming that of the Supreme Court of Puerto Rico, presenting grounds therefor and briefs in their support, and, moreover, should have requested from the Circuit Court that a hearing be had on the motion for reconsideration. Petitioner failed to do so, and cannot now complain that the Circuit Court of Appeals had not complied with and observed the due process clause of the Constitution.

Conclusion.

The judgment of the Supreme Court of Puerto Rico, affirming that of the District Court of Ponce, is correct. It accords with and conforms to the local laws as they have been

applied in this jurisdiction for over half a century. There is no legal ground for a reversal. In Puerto Rico, appeals are taken from the judgments of the courts and not from the reasons specified by the said courts for their decisions. Their reasoning may be erroneous. Nevertheless, the judgment may be correct if supported by the evidence adduced at the trial. Petitioner herein was heard by the Circuit Court of Appeals. The said Circuit Court did not deprive petitioner of any constitutional right. The judgment of the Circuit Court puts an end to petitioner's wrongful possession of properties that do not belong to it, a possession enjoyed for seven long years to the prejudice of the defendants, who are the rightful owners of said properties.

Justice has been done in the instant case.

The writ of certiorari should be denied and it is so prayed.

Respectfully submitted,

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By LEOPOLDO TORMES.

Received copy: Ponce, P. R., April 5, 1944.

PEDRO M. PORRATE,
One of the Attorneys for Petitioner.
Per (name illegible)

APPENDIX I.

Statutes.

PUERTO RICO

CIVIL CODE (Edition 1930)

Section 1044.—Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations.

Section 1066.—Every obligation, the fulfilment of which should not depend upon a future or uncertain event or upon a past event, unknown to the parties in interest, shall be immediately demandable.

Every obligation, containing a condition subsequent, shall also be demandable without prejudice to the effect of the performance.

Section 1110.—Obligations are extinguished:

By their payment or fulfilment.
By the loss of the thing due.
By the remission of the debt.
By the merging of the rights of the creditor and debtor.
By compensation.
By novation.

Section 1207.—The contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order.

Section 1213.—There is no contract unless the following requisites exist:

1.—The consent of the contracting parties.
2.—A definite object which may be the subject of the contract.
3.—The cause for the obligation which may be established.

Section 1226.—In contracts, involving a valuable consideration, the prestation or promise of a thing or services by the other party is understood as a consideration for each contracting party; in remuneratory contracts, the service or

benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor.

Section 1227.—Contracts without consideration or with an illicit one have no effect whatsoever. A consideration is illicit when it is contrary to law and good morals.

Section 1228.—The statement of a false consideration in contracts shall render them void, unless it be proven that they were based on another real and licit one.

Section 1229.—Even though the consideration should not be expressed in the contract, it is presumed that it exists and that it is licit, unless the debtor proves the contrary.

Section 1418.—The sale or assignment of a credit includes that of all the accessory rights, such as the security, mortgage, pledge, or privilege.

Section 1419.—A vendor in good faith shall be liable for the existence and legitimacy of the credit at the time of the sale unless it should have been sold as doubtful, but he shall not be liable for the solvency of the debtor unless it has been expressly stipulated, or if the insolvency should be prior and public.

Even in these cases he shall only be liable for the price received and for the expenses mentioned in number 1 of section 1407.

The vendor in bad faith shall always be liable for the payment of all the expenses, and for the losses and damages.

Section 1420.—If the assignor in good faith should have made himself liable for the solvency of the debtor, and the contracting parties should not have stipulated anything with regard to the duration of the liability, it shall last one year only, to be counted from the assignment of the credit if the period had already matured.

If the credit should be payable within a term or period which has not yet expired, the liability shall cease one year after its maturity.

Should the credit consist of a perpetual income, the liability shall be extinguished after ten years, counted from the date of the assignment.

Mortgage Law

Article 1.—Registries of real property shall continue to be situated where they have been established by the law. Registries can not be abolished or created, nor can the territorial district pertaining to each at the present time be changed, except by provision of law.

Instruments relating to estates situated within its territorial district shall be recorded in each registry. If an estate be situated within the territorial districts of two or more registries, it shall be recorded in all of them.

Article 2.—The following shall be recorded in the registries mentioned in the preceding article:

First.—Deeds conveying or declaring the ownership of real property or of property rights therein.

Second.—Instruments constituting, recognizing, modifying or extinguishing rights of usufruct, use, habitation, emphyteusis, mortgages rent charges, servitudes or any other real rights.

Third.—Acts or contracts under which real property or real rights are conveyed to a person, even though it be with the obligation of conveying the same to another or of applying the value thereof to specific objects.

Fourth.—Final judgment declaring legal incapacity to administrate, or the presumption of death of absentees, imposing a penalty of interdiction or any other penalty affecting the civil capacity of persons as to the free disposition of their property.

Fifth.—Contracts for the lease of real property for a term exceeding six years, or contracts under which rental for three or more years has been paid in advance, or contracts which do not have either of these conditions, but contain a special agreement between the parties that they be recorded.

Sixth.—Deeds of acquisition of real property and real rights possessed or administered by the State, or by civil or ecclesiastical corporations subject to the provisions of laws or regulations.

Article 24.—Recorded instruments shall produce their effects even against creditors specially preferred under the common law.

Article 25.—Recorded instruments shall not produce any effects as to third persons except from the date of their admission to recorded.

Article 26.—In order to determine the preference between two or more records of the same date, relating to one and the same estate, the hour the respective instruments were filed in the registry shall be considered.

Article 27.—For the purposes of this law, a third person shall be considered one who has not been a party to the recorded instrument or contract.

Article 28.—The date of the entry made upon presentation of an instrument, which must appear in the record itself, shall be considered the date of such record for all intents and purposes thereof.

Article 29.—Ownership or any other property right expressly mentioned in records or cautionary notices, although not appearing in the registry as a separate and special record, shall be effective against third persons from the date of the entry made upon presentation of the instrument.

The provisions of the foregoing paragraph shall be understood without prejudice to the obligation of specially recording such interests or to the liability which may be incurred by a person who must request the record in certain cases.

Article 30.—The records of the instruments mentioned in articles 2 and 5 shall be void if they do not set forth the circumstances mentioned in subdivisions 1, 2, 3, 4, 5, 6 and 8 of article 9, and subdivision 1 of article 13.

Article 31.—The nullity of the records referred to in the foregoing article shall not prejudice any interest previously acquired by a third person who was not a party to the recorded instrument or contract.

Article 32.—The record shall be understood to lack some of the details mentioned in the subdivisions and articles

cited in article 30, not only when it fails to mention all the requisites set forth in each of such articles or subdivisions, but also when they are expressed so inaccurately that a third person could thereby be lead into error as to the object of the same and suffer loss in consequence thereof.

When the inaccuracy is not material, in accordance with the provisions of the foregoing paragraph, or when the omission does not inclue all the details set forth in some of said subdivisions or articles, the record shall not be declared null and void unless it should cause an error and loss.

Article 33.—Instruments or contracts which are null under the law are not validated by their admission to record.

Article 34.—Notwithstanding the provisions of the foregoing article, instruments or contracts executed or entered into by person who, according to the registry, has a right to do so, shall not be invalidated with regard to third persons after they have been recorded, even though the interest of such party should subsequently be annulled or terminated by virtue of a prior deed which was not recorded or for reasons which do not clearly appear from said registry.

Only by virtue of a recorded instrument may another later instrument, also recorded, be invalidated to the prejudice of a third person, with the exceptions mentioned in article 389.

The provisions of this article shall at no time apply to an instrument recorded in accordance with the provisions of article 390, unless prescription has validated and assured the interest to which said instrument refers.

Article 35.—Prescription which does not require a good title (justo título) shall not prejudice a third person if the possession on which it is to be based does not appear of record.

Nor shall prescription which requires a good title prejudice a third person if such title is not recorded.

In either case the time of the prescription shall begin to run from the date of the record.

With regard to the legal owner of the real property or interest which is in process of prescribing, the title shall be determined and the time computed in accordance with the provisions of the common law.

Article 36.—Rescissory and resolutory actions shall not lie against third persons who have recorded the deeds of their respective interests in accordance with the provisions of this law.

Article 37.—The following are excepted from the rule contained in the foregoing article:

1.—Rescissory and resolutory actions which owe their origin to causes which specifically appear in the registry.

2.—Action for the rescission of conveyances made for the purpose of defrauding creditors in the following cases:

When the second conveyance was made under a gratuitous title.

When the third person was a party to the fraud.

In either case third persons shall not be prejudiced by a rescissory action not brought within one year from the date of the fraudulent conveyance.

Article 38.—As a consequence of the provisions of article 36, no instrument or contract shall be annulled or rescinded to the prejudice of a third person who shall have recorded his interest, for any of the following causes:

1. By reason of the revocation of donations in the cases permitted by the law, unless the donee shall fail to comply with the conditions recorded in the registry.

2. On account of legal redemption (retracto) in a sale or the right to acquire for the amount bid in emphyteusis.

3. On account of nonpayment or all or parte of the price of the thing sold; if the record should not show that payment was postponed.

4. On account of a duplicate sale of the same thing when one of the sales has not been recorded.

5. On account of a lesion in cases 1 and 2 of article 1291 of the Civil Code.

6. On account of conveyances made for the purposes of defrauding creditors, with the exception of the cases mentioned in the preceding article.

7. On account of any other actions which special laws or statutes grant to specific persons for the rescission of contracts by reason of causes which the record does not expressly show.

In any case in which the resolutory or rescissory action can not be brought against a third person in accordance with the provisions of this article, the proper personal action may be brought for the recovery of damages from the person who may have caused them.

Article 39.—By a conveyance under a gratuitous title to defraud creditors, in the first case of subdivision 2 of article 37, shall be understood not only one made by donation or assignment of the interest, but also any alienation, creation, or renunciation of a property right by the debtor within the periods mentioned in the common laws and in the laws of commerce, for the revocation of conveyances made to defraud creditors, provided there was no price, or its equivalent, or any preexisting past-due obligation.

Article 40.—The following may be revoked, in accordance with the provisions of the foregoing article, if the circumstances therein mentioned are present:

1. Rent charges, emphyteusis, servitudes, usufructs and other property rights created by the debtor.

2. The establishment of dowries or donations by reason of marriage in favor of the wife, children, or strangers.

3. Assignments of real property for the payment of debts not yet due.

4. Voluntary mortgages constituted for the security of debts previously contracted without such security, and not due, provided the conditions of the principal obligation are not thereby made more burdensome.

5. Any contract by which the debtor expressly or tacitly conveys or renounces a property right.

It shall be understood that no price or its equivalents figures in such contracts, when the notary does not certify to its payment, or if the contracting parties acknowledge that such payment was made prior to the execution of the

contract, and this fact is not established, or it is shown that it comes within the provisions of the third subdivision of this article.

Article 41.—The possessor of the real property or real right shall be considered a party to the fraudulent conveyance thereof in the second case of subdivision 2 of article 37:

1. If it be proved that he was aware of the purpose of such conveyance and that he was a party thereto as last owner or in any other capacity.

2. If he acquired his interest either directly from the debtor or from a subsequent possessor for half or less than half its real value.

3. If any kind of false statement or subterfuge having been employed in the contract entered into by the debtor, it be proved that the possessor was aware or took advantage thereof.

Article 42.—The following may request the entry of cautionary notices of their respective rights in the proper public registry:

1. He who brings an action to recover the ownership of real property or the constitution, declaration, modification or extinction of any real right.

2. He who, in accordance with the law, has obtained in his favor a writ of attachment, which has been levied on real property of the debtor.

3. He who, in any action, has obtained a final judgment against the defendants which shall be enforced according to the procedure prescribed in the title 8 of the Law of Civil Procedure.

4. He who brings a declaratory action for the enforcement of any obligation and obtains, in accordance with the law, an order directing the attachment or forbidding the alienation of real property.

5. He who brings an action for the purpose of obtaining any of the orders mentioned in subdivision 4 of article 2 of this law.

6. The widowed spouse, by reason of the right vested in him or her by article 838 of the Civil Code.

7. A legatee who under the law does not have the right to institute testamentary proceedings.

8. An agricultural creditor during the continuation of the works for which the loan was made.

9. He who files in the office of the registrar an instrument which can not be definitely recorded on account of the omission of some requisite capable of being supplied or on account of the disability of the registrar.

10. He who shall have the right to demand the entry of a cautionary notice in any other case, according to the provisions of this law.

Article 43.—In the case of subdivision 1 of the preceding article, a cautionary notice can not be entered except under an order of the court made on motion of a le-timate party and by virtue of a document sufficient therefor in the discretion of the court.

In the case of subdivision 2 of said article, the cautionary notice shall be obligatory according to the provisions of article 1435 of the Law of Civil Procedure in force in the Philippines and article 1451 of that force in Cuba and Porto Rico.

In the case of subdivision 5 of the said preceding article, the cautionary notice must also be entered under a court's order which it may issue on its own motion when there are no interested parties who request it, if the court in its discretion deems it advisable to secure the effectiveness of any judgment which may be rendered in the action.

Article 44.—A creditor who obtains the entry of a cautionary notice in his favor under the circumstances enumerated in subdivision 2, 3 and 4 of article 42, shall have preference, only with regard to the property against which the notice appears, over those who have against the same debtor another claim contracted susequently to such entry.

Article 45.—In the case of subdivision 6 of article 42, a widowed spouse may request a cautionary notice of his or her

right of usufruct in all the real property of the estate, conforming to the procedure prescribed in articles 55, 56, and 57 of this law.

Article 46.—A devisee who has no right under the law to institute testamentary proceedings may at any time request a cautionary notice respecting the thing devised to him if it be specific real property..

If the devise is not specific, the devisee may demand a cautionary notice of its value upon any real property of the estate sufficient to cover it, within 180 days after the death of the testator.

In either case the notice shall be entered upon presentation to the registrar of the instrument on which the devisee bases his right.

A devisee of specific real property or of credits or pensions secured thereby can procure a cautionary notice as to such property only.

Article 149.—The records of voluntary mortgages may be canceled only in the manner prescribed in article 82. If the persons who should cause the cancellation to be made should not agree thereto, it may be ordered by the court.

Article 150.—When a rent charge subject to a mortgage is redeemed, the mortgagee shall have the right to demand of the redemptioner that he pay him his claim in full together with interest due and to become due, or that he recognize his mortgage on the estate which had been encumbered by the rent charge.

Article 151.—In the latter case of the preceding article a new record of the mortgage shall be made which shall clearly set forth its acknowledgment by the redemptioner and produce its effects from the date of such record.

Article 152.—A mortgage credit may be conveyed or assigned to a third person in whole or in part, provided it be effected by means of a public instrument, notice of which is given to the debtor, and that it be recorded in the registry.

The debtor shall not be bound by said contract to any further extent than he was by his own.

The assignee shall be subrogated to all the rights of the assignor.

Article 153.—In a mortgage constituted to secure obligations transferable by indorsement or document payable to bearer, when the mortgage interest is conveyed or assigned, it shall be understood that the latter is conveyed, together with the obligation or document, without necessity of the debtor being advised thereof or the transfer being recorded in the registry.

Article 154.—If in case where it is necessary, a notice to the debtor of the assignment of the mortgage is omitted, the assignor shall be liable for any damage which the assignee may suffer as a consequence of such failure.

Regulations for execution of Mortgage Law

Article 185.—Before recording the assignment of a mortgage credit the debtor shall be advised, unless he shall have waived the right to notice in a public instrument, or if such a case as that mentioned in article 153 of the law should be involved, by means of a notice to be drawn signed by the notary who may have authenticated the deed, stating therein merely the date of the assignment, the facts of the same being total or partial, and in the latter case the amount, assigned, and the name, surname, residence, and occupation of the debtor.

If the debtor should not be found at his residence, service shall be made in the form prescribed for summonses in the first paragraph of article 268 of the Law of Civil Procedure for Cuba and Porto Rico, and 252 of that for the Philippines.

Article 186.—If the debtor should not reside in the town in which the deed is executed, the contract shall be recorded and the notice considered to have been served; but the assignor shall be obliged to petition the court to have a search made for the debtor and have the notice referred to served on him in the form prescribed in articles 266, 268, and 269 of the Law of Civil Procedure of Cuba and Porto Rico, 250, 252, and 253 of that for the Philippines, and under the liability established in article 154 of the Mortgage Law.

Article 187.—The assignment of a mortgage right shall be recorded in the registry in the form of a new record in favor of the assignee.

The transfer shall not be made a matter of record in the registry nor shall it be necessary to serve notice thereof on the debtor in the cases of exception mentioned in article 185.

Code of Civil Procedure of Puerto Rico

Section 388.—(26 L.) (1858 Cal.) In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Section 458.—(96 L.) (1957 Cal.) Indirect evidence is of two kinds:

1. Inferences; and
2. Presumptions.

Section 459.—(97 L.) (1958 Cal.) An inference is a deduction which the reason of the judge or jury makes from the facts proved, without an express direction of law to that effect.

Section 460.—(98 L.) (1959 Cal.) A presumption is a deduction which the law expressly directs to be made from particular facts.

Section 461.—(99 L.) (1960 Cal.) An inference must be founded:

1. On a fact legally proved; and

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

Section 463.—(101 L.) (1962 Cal.) The following presumptions, and no others, are deemed conclusive:

1.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto or their suc-

cessor in interest by a subsequent title; but this rule does not apply to the ricital of a consideration.

3. Whenever a party has, by his own declaration, act, or ommission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he can not in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.

Section 614.—(80 L.) (As amended by Act of March 9, 1911, page 119)—In all cases where, according to the provisions of the Civil Code, the parents or the tutor of a minor or incapacitated person, shall be in need of judicial authorization to do anything relative to the keeping of said minor or incapacitated person or of his property, a petition shall be filed with the district court of competent jurisdiction, setting forth under oath the following particulars:

1.—The name, age, domicile, civil status and profession of the petitioner, his legal relationship with the minor or incapacitated person, and if the petitioner be the tutor, then he shall add, the date of his appointment, the character of his tutorship and the affirmation that all the requirements necessary for the possession, security and faithful discharge of his duties as such tutor, have been complied with.

2.—The name, age, domicile, and civil status of the minor or incapacitated person and the names, and domiciles of his nearest akin relatives up to the fourth civil grade of consanguinity or second of affinity.

3.—Cause of the petition.

4.—The necessity or utility for the minor or incapacitated person of the act petitioned for.

5.—The minimum auction price of the property to be admitted in all cases of sale of real and personal property, where the value thereof exceeds the amounts determined in sections 229 and 282, paragraph five, of the Civil Code.

6.—If the authorization be for the constitution of a lien or encumbrance on real property, the nature and conditions of encumbrance shall be stated.

7.—The specific conditions of the contract in the case of exchange of real property or of the lease thereof, for a longer term than six years.

8.—The name of the party acquiring the right to be conveyed, except in the case of alienation through public sale.

9. —The placing or instrument to be made of the thing obtained by the minor or incapacitated person through the act or contract referred to in the authorization.

Section 615.—(81 L.) (As amended by Act of March 9, 1911, page 119)—Upon the filing of the petition, if this be in proper form, the court shall fix the date for the examination of the proof relative to the facts alleged, this act to take place in open court, or should the court be in recess, in the office of the judge, with the attendance of the district attorney whose duty shall be to protect the rights of the minor or incapacitated person.

The documentary proof shall comprise the demostration of the "patria potestas" or of the tutorship and if the authorization should apply to real estate, then the title of ownership and he assessment of the property for the purpose of taxation, if subject to taxes, shall also be included.

The judge, when deeming it advisable, shall have the right to, free of expense to the court, summon and examine, as to the facts alleged in the petition, the nearest adin relative of the minor or incapacitated person up to the fourth civil grade of consanguinity and second of affinity, residing in the Island, or any other person who may better serve to clear up the facts.

Should the minor be over fourteen years of age and he does not reside without the Island, he shall in every case appear before the court to answer the interrogatory to be put to him in the act of examining the proof.

The proofs having been examined, the judge shall grant or deny the authorization asked for in conformity with the result of the proof adduced, his decision being subject to appe-l to the Supreme Court of Porto Rico, either by the petitioner or the district attorney.

[No. 47]

AN ACT

To Amend Sections 2 and 6 of "An Act Establishing Quo Warranto Proceedings, Approved March 1, 1902, as Amended by Act No. 37, Approved April 24, 1931, and for Other Purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Section 2 of An Act entitled "An Act establishing Quo Warranto proceedings", approved March 1, 1902, is hereby amended as follows:

"Section 2.—In case any person should usurp, or unlawfully hold or execute any public office or should unlawfully make use of any franchise, or likewise shall hold any office in any corporation created by and existing under the laws of Puerto Rico, or any public officer shall have done or suffered any act which, by the provisions of the law, involves a forfeiture of his office, or any association or number of persons shall act within Puerto Rico as a corporation, without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for an information in the nature of *Quo Warranto* in the name of The People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the

proceeding, the court may grant the petition and order the information accordingly. Where it appears to the court that the several rights of divers parties to the same office or franchise may properly be determined on the same proceeding, the court may give leave to join all such persons in the same petition, in order to try their respective rights to such office or franchise."

"When any corporation by itself or through any other subsidiary or affiliated entity or agent is unlawfully holding, under any title, real estate in Puerto Rico, The People of Puerto Rico may, at its option, through the same proceedings, institute in its behalf the confiscation of such property, or the alienation thereof at public auction, within a term of not more than six months counting from the date on which final sentence is rendered.

"In every case, alienation or confiscation shall be through the corresponding indemnity as established in the law of eminent domain."

Section 2.—Section 6 of the Act entitled "An Act establishing *Quo Warranto* proceedings," approved March 1, 1902, is hereby amended as follows:

"Section 6.—In case any person or corporation against whom any such petition is filed, is adjudged guilty, the court may give judgment of ouster against such person or corporation from the office or franchise to which the petition refers, and fine such person or corporation for usurping, intruding in, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the defendant for the costs of the prosecutions; *Provided*, that whenever sentence is pronounced declaring that the defendant has usurped or is unlawfully exercising the functions of any public office, said defendant must cease immediately in said office, and abandon the same; and if he fails to do so, the court, on petition of the Attorney General or of any person interested in the office, shall issue an order to the marshal compelling him to oust the defendant from office.

"Whenever, in the opinion of the court, it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred by law, or in violation of the express provisions thereof, the judgment

entered shall, in case the defendant is a domestic corporation, decree the dissolution thereof and the prohibition to continue doing business in the country; and in the case of a foreign corporation, the nullity of all acts done and contracts made by the defendant corporation or entity; and in addition, said judgment shall decree the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico; and when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes, the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings.

"The violation of an order prohibiting the doing of business after final judgment is rendered shall be punished by a maximum fine of five hundred (500) dollars for each day such entity may continue in operation, enforceable on the property of the entity, and the persons representing it shall be guilty of contempt of court, punishable by imprisonment for a minimum term of from one to six months in jail.

"Whenever judgment is rendered in favor of any defendant, such defendant may recover costs from the plaintiff, including a reasonable attorney's fee.

"For the purpose of fixing the value of the property, The People of Puerto Rico, through its agents or representatives, is authorized to enter the properties the object of the controversy, whatever their nature or condition may be."

Section 3.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 4.—This Act, being of an urgent character, shall take effect immediately after its approval.

Approved, August 7, 1935.

Act No. 47, approved August 7, 1935, Laws of 1935, Special Session, pp. 530-536, copied in full in the Record here ("Exhibit No. 12", R. 240-243), amends Sections 2 and 6 of the Quo Warranto Law of March 1, 1902 (ante, p. 68; Sec. 6

already amended by the Act of 1931, Footnote 1, ante p — , amendment concerning public offices, immaterial here), so as to read in pertinent parts:

Section 2.—In case any person should usurp, or unlawfully hold or execute any public office * * *, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises rights not conferred by law, the Attorney General, or any prosecuting attorney of the respective district court, either on his own initiative or at the instance of another person, may file before any district court of Puerto Rico a petition for" (leave to file)[3] "an information in the nature of Quo Warranto in the name of The People of Puerto Rico; or whenever any corporation, by itself or through any other subsidiary or affiliated entity or agent, exercises rights, performs acts, or makes contracts in violation of the express provisions of the Organic Act of Puerto Rico or of any of its statutes, the Attorney General or any district attorney, either on his own initiative or at the instance of another person, may file before the Supreme Court of Puerto Rico a petition for" (leave to file)[3] "an information in the nature of Quo Warranto in the name of the People of Puerto Rico; and if from the allegations such court shall be satisfied that there is probable ground for the proceeding, the court may grant the petition and order the information accordingly. * * *

Section 6.—In case any person or corporation against whom any such petition is filed, is adjudged guilty, the court may give judgment of ouster against such person or corporation from the office or franchise to which the petition refers, and fine such person or corporation for usurping, intruding in, or unlawfully holding and executing such office or franchise, and also give judgment in favor of the defendant for the costs of the prosecutions; * * *

Whenever, in the opinion of the court, it is satisfactorily established that the corporation or corporations have performed acts or exercised rights not conferred

by law, or in violation of the express provisions thereof, the judgment entered shall, in case the defendant is a domestic corporation, decree the dissolution thereof and the prohibition to continue doing business in the country; and in the case of a foreign corporation, the nullity of all acts done and contracts made by the defendant corporation or entity; and in addition, said judgment shall decree the cancellation of every entry or registration made by the said corporations in the public registries of Puerto Rico; and when the decree of nullity affects real property and The People of Puerto Rico has chosen to confiscate it or orders it sold at public auction, the final judgment shall fix the reasonable price to be paid for said property. For these purposes, the just value of the property subject to alienation or confiscation shall be fixed in the same manner as it is fixed in cases of condemnation proceedings.

[No. 160]

[*Approved, May 14, 1943*]

AN ACT

To Amend Section 58 of the Land Law of Puerto Rico, Approved April 12, 1941, and for other Purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Section 58 of The Land Law of Puerto Rico, approved April 12, 1941, is hereby amended to read as follows:

"Section 58.—The acquisition, holding, or any other form of direct or indirect control of land in excess of five hundred (500) acres by any artificial person, as said term is defined in this Act, is hereby declared unlawful. This provision shall be applicable to any extension of land, which, jointly with such land as the acquirer may hold, possess, control or exploit at the time of the acquisition, aggregates over five hundred (500) acres. Artificial persons may, however, loan funds upon land security, and acquire land when necessary to collect loans, but they shall, within five years after receiving the title thereto, alienate such land as they may hold in excess of five hundred (500) acres.

"Actions filed for violation of this section shall be governed by the general provisions of the Code of Civil Procedure and by the special provisions of the Code of Civil Procedure and by the special provisions of the *Quo Warranto* Act relative to corporations engaged in agriculture and holding land in excess of five hundred (500) acres; *Provided, therefore,* That when it should be established that an artificial person, as said term is defined in this Act, has performed acts in violation of the provisions of this section, the judgment shall, in case the defendant is a domestic corporation, decree the dissolution thereof, and in the case of a foreign corporation, the prohibition to continue doing business in the country; and the nullity of all acts done and contracts made by the artificial person; the cancellation of every entry or registration made by same in the public registries of Puerto Rico; and a fine may be levied.

"The People of Puerto Rico may, at its option, demand, in the proceeding itself, the confiscation in its favor of the real property of the defendant entity, or the alienation of said property at public auction within a period of not more than six (6) months reckoned from the date on which final judgment is entered.

"The confiscation or alienation shall in every case be made upon proper compensation in the manner established by the Condemnation Proceedings Law. The Supreme Court is hereby empowered to appoint receivers who, in behalf and with the approval of said Supreme Court, shall be exclusively in charge of the liquidation and sale of the property of the artificial person or persons affected. The receivers shall give preference in the purchase of land to the Land Authority of Puerto Rico, which shall hold preferential option for the fair value of the property fixed in the final judgment. The receivers shall have the duty of beginning the sale of the land within a period of not more than six (6) months after the receivership is established. The Land Authority shall have a preferential right to purchase said lands for their fair value within a period of not to exceed one year, during which no sale may be made to any other person or entity. This period of one year may be extended for another year on authority of the Governor. Upon the expiration of such period or periods, the land shall be sold

at public auction. The Authority shall have priority or preference for the purchase of land at the public auction in those cases where it bids a price equal to that bid by the highest bidder. And the edicts published shall so state.

"The violation, after a final judgment is entered, of an order prohibiting the doing of business, shall be punished by a maximum fine of five hundred (500) dollars for each day that the entity continues to exercise its functions, recoverable from the property of the entity; and the persons representing such entities shall be held in contempt of court punishable by a minimum penalty of imprisonment in jail for a term of from one to six months.

"For the purpose of fixing the value of the property, The People of Puerto Rico is authorized to enter the property or holding the object of controversy."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent character, shall take effect immediately after its approval.

Approved May, 14, 1943.

APPENDIX II.

A Chronological Analysis of the Facts.

The true facts as they arise from the documentary and oral evidence weighed by the Insular Courts, undisputably show:

1.—On March 23, 1932, Elvira Olivieri Commins owed to the civil partnership Mario Mercado e Hijos, the sum of $41,256.89 (Rec. 324) and in payment thereof she subscribed on that date four promissory notes, the payment of which notes she secured with a voluntary mortgage constituted by her upon her jointly owned interests, an undivided half share, in each of the estates "Indios" and "Juanita". In payment of her debt, Elvira Olivieri Commins endorsed and delivered to partnership Mario Mercado e Hijos the four promissory notes (Rec. 424) aforesaid. It so appears from Public Deed No. 13 of March 23, 1932, executed before Notary Public Fernando Zapater Martinez.

2.—At the time the above negotiations took place, partnership Mario Mercado e Hijos was enjoying the possession of the undivided half shares belonging to Elvira Olivieri Commins in each of the "Indios" and "Juanita" properties under a contract of lease and was paying an annual lease rental of $4,100.00 (Rec. 326). The interests accruing from the principal amount owed by Elvira Olivieri Commins were retained by partnership Mario Mercado e Hijos from the lease rentals referred to (Rec. 326).

3.—Santia Olivieri Commins, a sister of Elvira, also owed to partnership Mario Mercado e Hijos, and in payment of her debt, she also subscribed and delivered promissory notes to the said partnership (Rec. 225-259).

4.—In the mortgage deed executed by Elvira Olivieri Commins to secure the four promissory notes she had endorsed to partnership Mario Mercado e Hijos, as well as in the deed executed by Sanita Olivieri Commins to secure the promissory notes she had also endorsed to partnership Mario Mercado e Hijos in payment of her debt, there were option clauses to purchase and to lease their undivided joint interest in the "Indios" and "Juanita" estates, as well as identical clauses—Clause 11—granting partnership Mario Mercado e Hijos the right to intervene in any partition that the said sisters Elvira and Santia Olivieri Commins, may carry out in connection with their "Indios" and "Juanita" properties. As regards clause 11 in Santia Olivieri Commins' contract, see Rec. 230-231; and, as regards that clause in Elvira Olivieri Commins' contract, see Rec. 235-236.

5.—On May 9, 1933 by public deed executed before Notary Fernando Zapater, partnership Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes that had been subscribed by Elvira Olivieri Commins, and the said partnership subrogated the assignees to its rights in the same degree and priorities by delivering said promissory notes to the Heirs of José Tous Soto (Rec. 397-411). On assigning the mortgage credit the only reservation then made by partnership Mario Mercado e Hijos was the right to retain three-fourths of one per cent annually of the interest accruing from the principal owed by

the mortgage debtor, whose retention Mario Mercado e Hijos made in consideration of the obligation assumed therein by Mario Mercado e Hijos to pay the interest to be accrued monthly instead of semi-annually as called for by the mortgage contract (Rec. 407).

6.—Neither in the aforesaid deed of assignment of the mortgage credit, nor in the petition filed in the District Court of Ponce, requesting judicial authorization to invest money belonging to the four minor children of José Tous Soto and to another one that was incapacitated, who were members of the succession of José Tous Soto was it expressly or otherwise stated that partnership Mario Mercado e Hijos had reserved any right whatsoever as regards the option to purchase and sell and to lease (Rec. 384-396).

7.—Notary Public Fernando Zapater Martínez, who was at the time attorney for partnership Mario Mercado e Hijos, served notice on Elvira Olivieri Commins of the assignment of the mortgage credit made by Mario Mercado e Hijos to the Heirs of José Tous Soto. Elvira Olivieri Commins was not informed as to any alleged reservation made by Mario Mercado e Hijos as regards the option clause to purchase and sell and to lease (Rec. 412-424).

8.—The deed of assignment of the mortgage credit was recorded in the Registry of Property of Ponce and the option clause to purchase and sell and to lease passed with the mortgage to the Heirs of Tous Soto (Rec. 460-465).

9.—Rafael Barletta, a relative and agent of Elvira Olivieri Commins, was negotiating with partnership Mario Mercado e Hijos the purchase by said partnership of the properties belonging to Elvira Olivieri Commins, and the continuance of the lease on those properties. There appears nothing either from the documentary or from the oral evidence in the record preventing Elvira Olivieri Commins from selling or leasing her "Indios" and "Juanita" properties. She was not compelled to seek the consent of partnership Mario Mercado e Hijos to sell or to lease those properties due to the fact that said partnership, since August 20, 1933, had parted with the option clause to purchase and sell and to lease embodied in the mortgage deed (Rec.

397-412). From that date on, i.e., from August 20, 1933, the option belonged to the Heirs of José Tous Soto to the exclusion of any other person or persons.

10.—On August 20, 1936, by public deed to that effect, the properties "Indios" and "Juanita" were divided between the sisters Santia Olivieri Commins and Elvira Olivieri Commins (Rec. 225). Partnership Mario Mercado e Hijos, being at that time the mortgage creditor of Santia Olivieri Commins, appeared in said deed by reason of the fact that, in the mortgage contract that Santia Olivieri Commins had executed to secure the payment of the promissory notes she had subscribed and endorsed to the referred to partnership, there was an option in favor of Mario Mercado e Hijos to purchase and sell and to lease the mortgaged properties.

The appearance had the purpose of making certain explanations in the deed in order not to become liable as to certain rights of adojining land owners (Rec. 255-256). Nowhere in the deed of partition Elvira Olivieri Commins made acknowledgment of any rights whatsoever in favor of partnership Mario Mercado e Hijos (Rec. 225-258).

11.—On March 4, 1937, the Heirs of José Tous Soto, by their Attorney Fernando Zapater, who also was the attorney for partnership Mario Mercado e Hijos, appeared before the District Court of Ponce requesting judicial authorization to cancel the mortgage that encumbered the properties of Elvira Olivieri Commins and secured the four promissory notes that partnership Mario Mercado e Hijos had conveyed and assigned, more than three years before, to the Heirs of José Tous Soto. The District Court of Ponce was not informed of any reservation whatever made by Mario Mercado as to the option clause to purchase and sell and to lease embodied in the mortgage contract securing those promissory notes, and the said District Court of Ponce, having at hand the deed of assignment of the mortgage credit to which the Heirs of Tous Soto were a party, after weighing the evidence presented at the hearing had in the proceedings before it, authorized the cancellation in full of the mortgage (Rec. 425-541).

12.—The Heirs of José Tous Soto, i. e., all the members constituting the succession, appeared before Notary Fernando Zapater, and by deed of Mareh 8, 1937, cancelled in full the mortgage encumbering the "Indios" and "Juanita" properties belonging to Elvira Olivieri Commins (Rec. 312-321). The second clause of said deed reads as follows:

> "Second:—By virtue of the terms of the foregoing clause, Mrs. Belén González, in her own right and in the representation assumed by her herein, conformable to the order of the District Court for the Judicial District of Ponce already transcribed, Doña Ana-Rosa, Doña Alicia, Doña Celia, Doña Belén-Mariá, Doña Gladys and Don Jorge Tous González, the first three parties with the express consent of their respective spouses Don Vicente Usera, Jr., Don José B. Carrión and Don Ignacio Maldonado, acknowledge as fully cancelled and extinguished the mortgage constituted by deed No. 13, dated March 23, 1932, executed before notary José Tous Soto, the attesting notary in said execution acting as a substitute, in favor of the partnership Mario Mercado e Hijos, and conveyed subsequently to the parties hereto by said deed No. 33, dated May 9, 1933, before me, such cancellation to be recorded in the proper registry of property conformable to the wish and consent of the parties" (Rec. pp. 318-319).

13.—The deed of cancellation of the mortgage aforesaid, executed under the authority given by the District Court of Ponce caused and brought about the full cancellation in the Registry of Property of the record entries of the mortgage securing the four promissory notes that up to May 9, 1933 had belonged to Mario Mercado e Hijos and from that date on to the date in which they were paid, the property of and belonged to the Heirs of José Tous Soto (Rec. 460-465).

14.—After its cancellation in the Registry of Property of Ponce, nothing remained of the mortgage credit therein. There was nothing then in such registry preventing Elvira Olivieri Commins, nor there was anybody in position to prevent her, from paying a debt guaranteed by said mortgage,

mortgage that had only brought her embarrassments and worries. After paying the mortgage debt by deed executed before Notary Luis López de Victoria on March 9, 1937, Elvira Olivieri Commins sold her "Indios" property to the defendants Lluberas-Passarell for $40,000.00 that they paid to her (Rec. 260-267). From May 9, 1933 on, partnership Mario Mercado é Hijos had no status or standing to bring any action in connection with the option clause embodied in the mortgage contract securing the payment of the four promissory notes subscribed by Elvira Olivieri Commins, inasmuch as on that date said partnership had fully conveyed and assigned to the Heirs of José Tous Soto the mortgage credit represented by the said four promissory notes and the mortgage securing those notes (Rec. 397-411).

15.—The statements attributed to Elvira Olivieri Commins, as made after the sale of her "Indios" property to the Lluberas-Passarell brothers, cannot produce any effect or operate against the title of the defendants Lluberas-Passarell. The district (trial) Court of Ponce on weighing the testimony of plaintiff's witnesses in the instant case, gave no credit to their testimony. On the contrary, the trial court believed the testimony of Elvira Olivieri Commins, who denied that she had made anyone of the statements that plaintiff attributed her and testified also that the said witnesses for plaintiff came to her home in a violent manner (Rec. 100-101).

16.—The claims made by petitioner Mario Mercado e Hijos to rescind the contract of sale were dismissed by the District Court of Ponce and by the Surpeme Court of Puerto Rico, after said courts had construed and applied the local statutes applicable to the indisputable facts arising from documents that, presented in evidence, are drawn in clear and precise terms, and from testimonies appreciated and weighed by a judge on whom no imputation of partiality, passion or prejudice in weighing the evidence is made and no such partiality, passion or prejudice appears from the record.

17.—Rule 39(b) of the Circuit Court of Appeals for the First Circuit is valid. Such rule did not deprive petitioner

of any of his rights under the Constitution or other laws in force. Since May 9, 1933, when the petitioner Mario Mercado e Hijos conveyed and assigned to the Heirs of José Tous Soto the four promissory notes that Elvira Olivieri Commins had subscribed and secured with a mortgage on her properties, without petitioner having reserved any right as regards the option clause to purchase and sell and to lease embodied in the mortgage contract as an integral part thereof, the said partnership Mario Mercado e Hijos lost all rights to claim, or to bring an action, in connection with the referred to option clause, and has no *status* or standing before any court either to bring such action or to raise before this Honorable Supreme Court the validity of Rule 39(b) of the Circuit Court of Appeals for the First Circuit.

18.—The judgment rendered by Judge Sepúlveda of the District Court of Ponce (Rec. 45) that was unanimously affirmed by the Supreme Court of Puerto Rico (Opinion delivered by Mr. Chief Justice del Toro, Rec. 488), and later on appealed to the Circuit Court of Appeals for the First Circuit (appeal dismissed, Rec. 516) is correct and conforms to the laws and to the facts in the case as shown by the evidence weighed and believed by impartial judges learned in local statutes applicable to those facts.

IN THE SUPREME COURT OF PUERTO RICO

No. 2

THE PEOPLE OF PUERTO RICO, Plaintiff,

v.

MARIO MERCADO E HIJOS, Defendant.

Dissolution of Partnership.

COMPLAINT

Now comes The People of Puerto Rico, by its Acting Attorney General, and alleges:

1. That defendant "Mario Mercado e Hijos" is a civil agricultural partnership, domiciled in the city of Ponce, Puerto Rico, dedicated to the planting of cane and the proc-

essing of sugar as its principal activities, and was constituted on June 13, 1916, in accordance with the Codes of Puerto Rico by public deed number 36, executed in the city of Ponce, Puerto Rico, before notary Antonio F. Castro, modified by public deeds number 99, executed in the same city before notary José Tous Soto on June 11, 1926; number 10 executed in the same city before notary Benigno Fernández Garcia on July 7, 1935; and number 11 executed before the same notary in the same city on July 11, 1935.

2. That in violation of the statutes and agrarian policies of The People of Puerto Rico, defendant has owned since it was constituted, dedicating them to agricultural activities, lands in excess of five hundred acres, and is at present owner in fee simple of about 9,800 cuerdas, equivalent to about 9,520 acres, dedicated to the same activities, distributed among the municipalities of Ponce, Juana Díaz, Peñuelas, Guayanilla, San Germán, Lajas, and Sabana Grande.

Wherefore The People of Puerto Rico prays that the Court render judgment ordering the dissolution of defendant "Mario Mercado e Hijos", and imposing upon it the corresponding fine, together with any other relief in law and in equity as may be proper.

San Juan, Puerto Rico, November 4, 1943.

(Signed) M. Rodríguez Ramos,
Acting Attorney General.

Miguel Guerra-Mondragón,
Rafael Rivera Zayas,
Luis Venegas Cortés,
Nilita Vientós Gastón,
Associate Counsel.

Certificate of Translation

I, Ignacio Rivera, Assistant Secretary and Interpreter of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful translation of the complaint filed by The People of Puerto Rico on November 4, 1943, in the above-entitled case, as the same appears from the original record of the case on file in the office of the Secretary-Reporter.

In Testimony Whereof, I have signed this certificate at San Juan, Puerto Rico, this 17th day of March, 1944.

IGNACIO RIVERA,
Assistant Secretary and Interpreter,
Supreme Court of Puerto Rico.

SECRETARY-REPORTER'S CERTIFICATE

I, Joaquín López, Secretary-Reporter of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and correct copy in translation of the complaint filed by The People of Puerto Rico on November 4, 1943, in the above-entitled case; that Ignacio Rivera, who signs the foregoing certificate, is the Assistant Secretary and Interpreter of this Court; and that the foregoing translation has been made by him as shown by his certificate above set forth.

In Testimony Whereof, at the request of Leopoldo Tormes, Esq., I have hereunto set my hand and affixed the seal of this Court, after duly cancelling internal revenue stamps in the amount of two dollars, at San Juan, Puerto, this 17th day of March, 1944.

JOAQUÍN LÓPEZ,
Secretary-Reporter
Supreme Court of Puerto Rico.